INDEX

738-495—64——1

62 Civ. 3903

CIVIL DOCKET

A In the United States District Court

Jury demand date:

D.C. Form No. 106 Rev.

Title of case	Attorneys
UNITED STATES OF AMERICA *vs.* OMAR, S.A., A URUGUAYAN CORPORATION; LAZARD FRERES & CO., LEHMAN BROTHERS, BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK & TRUST CO.; FIRST NATIONAL CITY BANK OF NEW YORK, FIRST NATIONAL CITY TRUST CO., AND SWISS BANK CORPORATION.	For plaintiff: US Atty. For defendant:

Statistical record	Costs		Date	Name or receipt No.	Rec.		Disb.	
J.S. 5 mailed X	Clerk		12-4-62	Shearman	5	—		
J.S. 6 mailed	Marshal		12-7-62	Pd.U.S.Treas			5	—
Basis of Action: Tax liens for income taxes due.	Docket fee							
	Witness fees							
Action arose at:	Depositions							

2

DOCKET ENTRIES

B 62 Civ. 3603

U S A *vs.* Omar S.A. et al.

Date	Proceedings	Date order or judgment noted
Oct. 31-62	Filed complaint and issued summons.	
Nov. 2-62	Filed pltff's affdvt. & show cause order for injunction—ret. 11-5-62.	
Nov. 14-62	Filed affdvt. of John B. Lowe on behalf of defts. in opposition to pltff's motion.	
Nov. 14-62	Filed memorandum of 1st Nat'l City Bank & 1st Nat'l City Trust Co. in opposition.	
Nov. 14-62	Filed pltff's memorandum of points & authorities.	
Nov. 14-62	Filed affdvt. of David A. Campbell in opposition.	
Nov. 14-62	Filed Opinion #28,335—all defts. except First Nat'l City Trust & Belgian-American Bank & Trust Co.-enjoined—Submit injunction in accordance with this decision-Dawson, J.	
Nov. 16-62	Filed order pending the determination of this application-defts. Lazard Freres & Co; Lehman Bros.; Belgian-American Banking; Belgian-Amer. Bank & Trust, First Nat'l City Bank of NY. & First Nat'l City Trust Co. be restrained from selling, transferring, etc. service of a copy of this order shall be made upon said defts. on or before 11-10-62 by 5:00 p.m.—Dawson, J. mailed notice—Marshal's return of service of order attached.	
Nov. 17-62	Filed stip. & order extending time for deft. Lehman Bros. to answer to 12-10-62—Clerk.	
Nov. 21-62	Filed stip. & order extending time for defts' (First National City Bank and First National City Trust Co to answer to 12-4-62.—Clerk.	
Nov. 21-62	Filed order, that pending the determination of this action or until further order of this court, the defts, Lazard Freres & Co; Lehman Brothers, Belgian-American Banking Corp and First National City Bank of New York, or any of them be and they are hereby restrained from selling, transferring, pledging encumbering, disposing of, or distributing any property or rights to property of Omar, S.A. including but not limited to, any sums, credits, stock, or bonds or any interest, dividends of the said Omar, S.A., by them or by any of their branches agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not.—Dawson, J.—m.n.	
Nov. 23-62	Filed stip. & order extending time of deft. Lazard Freres & Co. to answer to 12-6-62—Clerk.	
Nov. 23-62	Filed stip. & order extending time of defts. Belgian-Amer. Banking & Belgian-Amer. Bank & Trust Co. to answer to 12-5-62—Clerk.	
Dec. 4-62	Filed deft's (First Nat'l City Bank) notice of appeal mailed copy to U S Attorney	
Dec. 4-62	Filed bond undertaking for costs on appeal—Great American Ins. Co.	
Dec. 5-62	Filed stip & order extending time of defts. (Belgian-American Bkg Corp & Belgian American Bk & Tr Co.) to answer to 12-19-62—Clerk.	
Dec. 5-62	Filed stip & order extending time of defts (First National City Bak & First Nat'l City Tr Co) to answer to 12-18-62—Clerk	
Dec. 11-62	Filed stip. & order extending time of deft. Lazard Freres & Co. to answer to 12-20-62—Clerk.	
Dec. 11-62	Filed stip. & order extending time for deft. Lehman Bros. to answer to 12-20-62—Clerk	
Dec. 12-62	Issued additional summons.	
Dec. 12-62	Filed pltff's amendment to complaint.	
Dec. 18-62	Filed additional summons & return, served Swiss Bank 12-14-62.	
Dec. 20-62	Filed stip. & order extending time for defts. First Nat'l City Bank & First Nat'l City Trust to answer to 1-18-63—Weinfeld, J.	
Dec. 20-62	Filed stip. & order extending time for defts. Belgian-Amer. et ano to answer to 1-18-63—Weinfeld, J.	
Dec. 22-62	Filed stip. & order extending time for deft. Lehman Bros. to answer to 1-18-63—Weinfeld, J.	
Dec. 22-62	Filed stip. & order adjourning pltff's show cause order to 12-31-62, etc.—Weinfeld, J.	
Dec. 31-62	Filed stip. & order adjourning pltff's show cause order to 1-15-63, etc.—Cooper, J.	

C [File endorsement omitted]

1 [File endorsement omitted]

In The United States District Court for the Southern District of New York

(62 Civ. 3603)

UNITED STATES OF AMERICA, PLAINTIFF

v.

OMAR, S. A., A URUGUAYAN CORPORATION; LAZARD FRERES & CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK & TRUST CO.; FIRST NATIONAL CITY BANK OF NEW YORK; AND FIRST NATIONAL CITY TRUST CO., DEFENDANTS

Complaint—Filed October 31, 1962

The United States of America, plaintiff herein, by its attorney, Vincent L. Broderick, United States Attorney for the Southern District of New York, alleges as follows:

I

This action is brought pursuant to Sections 7401, 7402, and 7403 of the Internal Revenue Code of 1954, and pursuant to Section 1345 of Title 28 of the United States Code.

II

This action is authorized and sanctioned by the Commissioner of Internal Revenue, the delegate of the Secretary of the Treasury, and is brought at the direction of the Attorney General of the United States.

III

At all times mentioned herein this plaintiff has been and is now a sovereign corporation and body politic.

2 IV

(a) The defendant, Omar, S.A., is a Uruguayan corporation whose address is 12 de Diciembre 789, Montevideo, Uruguay.

(b) The defendant, Lazard Freres & Co. is licensed to do business within the State of New York and has a place of business at 44 Wall Street, New York, New York.

(c) The defendant, Lehman Brothers, is licensed to do business within the State of New York and has a place of business at One William Street, New York, New York.

(d) The defendant, Belgian-American Banking Corp., is a corporation licensed to do business in the State of New York and has a place of business at 52 Wall Street, New York, New York.

(e) The defendant, Belgian-American Bank & Trust Co., is a corporation licensed to do business in the State of New York and has a place of business at 52 Wall Street, New York, New York.

(f) The defendant, First National City Bank of New York, is a corporation licensed to do business in the State of New York and has a place of business at 55 Wall Street, New York, New York.

(g) The defendant, First National City Trust Co., is a corporation licensed to do business in the State of New York and has a place of business at 22 William Street, New York, New York.

V

On October 31, 1962, the Director of International Operations, a delegate of the Commissioner of Internal Revenue, assessed a corporate income tax deficiency plus interest and penalties against the defendant, Omar, S.A., in the amount of $1,078,780.76 for the fiscal year ending March 31, 1955. Notice of this assessment and demand for payment of this
3 assessment was sent to the taxpayer on October 31, 1962, but the taxpayer has neglected and failed to pay this assessment and there is outstanding on this assessment the sum of $1,078,780.76 plus interest according to law.

VI

On October 31, 1962, the Director of International Operations, a delegate of the Commissioner of Internal Revenue, assessed a corporate income tax deficiency plus interest and penalties against the defendant, Omar, S.A., in the amount of $3,915,868.00 for the fiscal year ending March 31, 1956. Notice of this assessment and demand for payment of this assessment

was sent to the taxpayer on October 31, 1962, but the taxpayer has neglected and failed to pay this assessment and there is outstanding on this assessment the sum of $3,915,868.00, plus interest according to law.

VII

On October 31, 1962, the Director of International Operations, a delegate of the Commissioner of Internal Revenue, assessed a corporate income tax deficiency plus interest and penalties against the defendant, Omar, S.A., in the amount of $1,235,625.50 for the fiscal year ending March 31, 1957. Notice of this assessment and demand for payment of this assessment was sent to the taxpayer on October 31, 1962, but the taxpayer has neglected and failed to pay this assessment and there is outstanding on this assessment the sum of $1,235,625.50 plus interest according to law.

VIII

On October 31, 1962, the Director of International Operations, a delegate of the Commissioner of Internal Revenue, assessed a corporate income tax deficiency plus interest and penalties against the defendant, Omar, S.A., in the amount of $2,027,979.66 for the fiscal year ending March 31, 1958. Notice of this assessment and demand for payment of this assessment was sent to the taxpayer on October 31, 1962, but the taxpayer has neglected and failed to pay this assessment and there is outstanding on this assessment the sum of $2,027,979.66 plus interest according to law.

IX

On October 31, 1962, the Director of International Operations, a delegate of the Commissioner of Internal Revenue, assessed a corporate income tax deficiency plus interest and penalties against the defendant, Omar, S.A., in the amount of $4,006,282.26 for the fiscal year ending March 31, 1959. Notice of this assessment and demand for payment of this assessment was sent to the taxpayer on October 31, 1962, but the taxpayer has neglected and failed to pay this assessment and there is outstanding on this assessment the sum of $4,006,282.26 plus interest according to law.

X

On October 31, 1962, the Director of International Operations, a delegate of the Commissioner of Internal Revenue, assessed a corporate income tax deficiency plus interest and penalties against the defendant, Omar, S.A., in the amount of $4,003,005.64 for the fiscal year ending March 31, 1960. Notice of this assessment and demand for payment of this assessment was sent to the taxpayer on October 31, 1962, but the taxpayer has neglected and failed to pay this assessment and there is outstanding on this assessment the sum of $4,003,005.64 plus interest according to law.

5 XI

On October 31, 1962, the Director of International Operations, a delegate of the Commisisoner of Internal Revenue, assessed a corporate income tax deficiency plus interest and penalties against the defendant, Omar, S.A., in the amount of $3,001,615.05 for the fiscal year ending March 31, 1962. Notice of this assessment and demand for payment of this assessment was sent to the taxpayer on October 31, 1962, but the taxpayer has neglected and failed to pay this assessment and there is outstanding on this assessment the sum of $3,001,615.05 plus interest according to law.

XII

The total amount due on the assessments set forth in paragraphs V to XI above is $19,269,156.87, and payment of this sum is secured by a lien arising on the date of assessment, October 31, 1962, and which lien encumbers all property and rights to property of the defendant-taxpayer, Omar, S.A., whether situated in the United States or elsewhere.

XIII

The defendant, Lazard Freres & Co., presently holds stocks, bonds, securities and sums of money for or for the account of the defendant, Omar, S.A., and this property is encumbered by the aforementioned federal tax lien. The property presently held by Lazard Freres & Co., in addition to a cash sum of money includes but is not limited to 7,448 shares of stock in the company known as Mineral & Chemical-Philipp Corp. and 29,837 shares of stock in the company known as Cemento Andino,

S.A., and bonds valued in excess of $117,500.00 of the company known as Cemento Andino, S.A.

6 XIV

The defendant, Lehman Brothers, presently holds stocks, bonds, securities and sums of money for the account of the defendant, Omar, S.A., and this property is encumbered by the aforementioned federal tax lien. The property presently held by Lehman Brothers in addition to a cash sum in excess of $177,549.00 includes but is not limited to 1300 shares of stock in the company known as Eastern States Corp., 5300 shares of stock in the company known as Mineral & Chemical-Philipp Corp., and bonds valued in excess of $72,000 of the company known as Plicoflex, Inc.

XV

The defendants, Belgian-American Banking Corp., Belgian-American Bank & Trust Co., First National City Bank of New York, and First National City Trust Co., presently hold substantial sums of money for, for the account of, or to the credit of, Omar, S.A., which sums are encumbered by the aforementioned federal tax lien. Further, these sums are held in the United States and in branch offices of these banks in other countries.

WHEREFORE, plaintiff prays:

1. That the Court find, determine and adjudge that the defendant-taxpayer, Omar, S.A., is indebted to the plaintiff in the amount of $19,269,156.87 plus interest according to law, and that the plaintiff have judgment therefor;

2. That the Court find, determine and adjudge that the plaintiff has a valid and subsisting tax lien, in the amount of the liability adjudged, upon and against all property and rights to property of the defendant-taxpayer, Omar, S.A.;

7 3. That, pending the determination of this suit, this Court enjoin any defendant herein in custody or control of property or rights to property of the defendant-taxpayer, Omar, S.A., from selling, transferring, pledging, disposing of, or distributing any of said property, or the dividends, interest, or other earnings thereon;

4. That the Court compel the defendants, First National City Trust Co., First National City Bank of New York, Belgian-

American Banking Corp., and Belgian-American Bank & Trust Co., to return all property and rights to property of defendant-taxpayer, Omar, S.A., to the jurisdiction of this Court for disposition and application consistent with the interests of plaintiff and for enforcement of plaintiff's lien on said property and rights to property;

5. That this Court order the foreclosure of the plaintiff's lien on the property now held by the defendants, Omar, S.A., Lazard Freres & Co., Lehman Brothers, Belgian-American Banking Corp., Belgian-American Bank & Trust Co., First National City Bank of New York and First National City Trust Co., and that this Court order the said property to be sold at a judicial sale in accordance with law and the proceeds therefrom to be turned over to this plaintiff in satisfaction of this plaintiff's lien on said property except that this Court order such sums of money as are held by these defendants to be paid over to this plaintiff in satisfaction of this plaintiff's lien.

8 6. That this Court grant this plaintiff such other and further relief that it deems is just, equitable and proper in the premises including costs.

VINCENT L. BRODERICK,
United States Attorney.

By ROBERT ARUM,
Assistant United States Attorney, U.S. Court House, Foley Square, New York 7, N.Y., CO 7-7100 Ext. 326.

9 *Duly sworn to by John F. Beggan—jurat omitted in printing.*

10 [File endorsement omitted]

In the United States District Court for the Southern District of New York

62 Civ. 3603

[Title omitted]

Order to Show Cause—October 31, 1962

Upon the annexed application for temporary restraining order of the plaintiff United States of America and upon the annexed affidavits of William R. T. Gottliev, John H. Walker and Forrest J. Kern, let the defendants OMAR, S.A., a Uruguayan corporation; LAZARD FRERES & CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK & TRUST CO.; FIRST NATIONAL CITY BANK OF NEW YORK; and FIRST NATIONAL CITY TRUST CO., show cause before this Court, at a term for motions thereof, to be heard at the United States Courthouse, Room 506, Foley Square, in the Borough of Manhattan, City of New York, on the 5th day of November, 1962, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be entered enjoining and restraining defendants LAZARD FRERES & CO., LEHMAN BROTHERS, BELGIAN-AMERICAN
11 BANKING CORP., BELGIAN-AMERICAN BANK & TRUST CO., FIRST NATIONAL CITY BANK OF NEW YORK, and FIRST NATIONAL CITY TRUST CO., or any of them, from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of defendant-taxpayer OMAR, S.A., including, but not limited to, any sums or credits or stock or bonds or any interest, dividends or other earnings thereon now held for or for the account of the said defendant-taxpayer, by them or by any of their branches, agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not.

Sufficient reason appearing therefor, it is

ORDERED that pending the hearing and determination of this application, or the expiration of ten days from the date hereof, whichever shall first occur, the defendants, LAZARD FRERES

& CO., LEHMAN BROTHERS, BELGIAN-AMERICAN BANKING CORP., BELGIAN-AMERICAN BANK & TRUST CO., FIRST NATIONAL CITY BANK OF NEW YORK, and FIRST NATIONAL CITY TRUST CO., or any of them, be and they are hereby restrained from selling, transferring, pledging, encumbering disposing of, or distributing any property or rights to property of OMAR, S.A., including, but not limited to, any sums, credits stock or bonds or any interest dividends, or other earnings thereon now held for or for
12 the account of the said OMAR, S.A., by them or by any of their branches, agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not. It is further

ORDERED that service of a copy of this Order to Show Cause and affidavits annexed hereto shall be made upon the said defendants on or before the 1st day of November, 1962, by 5 p.m.

Dated: New York, N.Y., October 31, 1962.

H. R. TYLER, Jr.,
U.S.D.J.

Issued at 3:40 p.m. the 31st day of October, 1962.

13 In the United States District Court
for the Southern District of New York

62 Civ. 3603

[Title omitted]

Order to Show Cause—October 31, 1962

[CLERK'S NOTE: "Order to show cause—October 31, 1962" is omitted from the record here. It appears on page 9, supra.]

16 In the United States District Court
for the Southern District of New York

[Title omitted]

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiff moves the Court for an order temporarily restraining defendants, Lazard Freres & Co., Lehman Brothers, Belgian-American Banking Corp., Belgian-American Bank & Trust Co., First National City Bank of New York, and First National City Trust Co., or any of them, from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of defendant-taxpayer, Omar, S.A., including, but not limited to any sums or credits or stocks or bonds or any interest, dividends or other earnings thereon now held for or for the account of the said defendant-taxpayer, by them or by any of their branches, agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not.

In support of this application plaintiff shows:

17 1. Defendant-taxpayer, Omar, S.A., is indebted to plaintiff for assessed income taxes, penalties and interest in the total amount of $19,269,156.87, plus unassessed interest thereon as provided by law.

2. The assessment described in paragraph 1 hereinabove, is secured by a federal tax lien upon all property and rights to property of the said defendant-taxpayer.

3. The principal assets of the said defendant-taxpayer consist of sums, credits, stocks, and bonds now held by the defendants herein or by their branches, agents or nominees both within and without the United States.

4. If any of the said sums, credits, stocks or bonds, or any interest, dividends, or other earnings thereon, are sold, transferred, pledged, encumbered, disposed of, or distributed, plaintiff's lawful rights in and to said sums, credits, stocks and bonds and any interest, dividends or other earnings thereon might become unenforceable in fact and plaintiff would be irreparably injured inasmuch as they might be removed from the power of the Courts of the United States by being transferred to persons without the territorial limits of the United States, or they might be transferred to bona fide purchasers, thus leaving

the Government without a remedy by which it could enforce the large tax liability of defendant-taxpayer, Omar, S.A.

5. Agents and representatives of defendant-taxpayer, Omar, S.A., have threatened to transfer or cause to be transferred its assets now within the United States outside of the territorial limits of the United States if tax claims or assessments were made against it and substantial assets of said defendant-
18 taxpayer have recently been transferred outside of the territorial limits of the United States all as is more particularly set forth in the attached affidavits which are referred to and adopted herein as though fully set forth herein.

The matters, facts and averments contained in the complaint filed herein are referred to and adopted herein as though fully set forth herein.

No previous application for this relief has heretofore been made.

VINCENT BRODERICK,
United States Attorney.

By ROBERT ARUM,
Assistant United States Attorney.

19 Affidavit of William R. T. Gottlieb in support of application for temporary restraining order:

I, William R. T. Gottlieb, am an employee of the U.S. Internal Revenue Service, Office of International Operations, Washington, D.C., in the capacity of Internal Revenue Agent. I presently reside at 2335 11th St., North Arlington, Virginia.

On or about 2 June 1959 an Internal Revenue form 1120NB, Income Tax return of a nonresident foreign corporation, filed by Omar, S.A., of Montevideo, Uruguay, was assigned to me for examination. Aside from the name and address of the taxpayer, only line 7(b) of the return had been completed. Line 7(b) indicates a credit from a regulated investment company, which Omar claimed in the amount of $10,358.42. This amount has, apparently, been refunded. The questions on the reverse of the form, under the heading "Additional Information Required" had not been completed. Accordingly, I wrote to Omar on 30 December 1959, requesting this additional information; this letter was followed by a second request on 29 February 1960. Finally, the requested information was supplied, and indicated that Omar did not consider itself to be a personal holding company. In October 1960, a Consent; form 872, was solicited and eventually received. On 1 February 1961, a visit was made at the offices of Lehman Bros. and Lazard Freres, both of New York, N.Y., since it had been learned that these two firms had received income on behalf of Omar. The names and addresses of Omar's directors were secured at this time, and it was learned that accounts were handled by these firms for Omar whereby orders for the purchase and sale of securities were placed with these firms and received by them in New York City by telephone, letter, or cable, from abroad.

20 On 26 April 1961, I wrote to Omar and said that information had been obtained which warranted the assumption that Omar was a personal holding company, and that a meeting with a qualified representative of the taxpayer was advisable. On 16 May 1961, Edward Merrigan, Attorney, called to say that Omar was represented by counsel in New York City, and that an appointment was desired in New York City. He did not identify the New York firm. Merrigan called back on 23 May to say that he had checked and found that counsel in New York did not have a power of attorney and could not represent Omar after all. On 8 June I again

wrote to Omar and reviewed the situation, and stated that since no meeting had taken place as requested, on 31 May, I now proposed to make a determination of Omar's tax liability on the basis of information at hand. I now know that in June 1961, a director of Omar came to the United States, and at that time Omar commenced to liquidate its United States holdings of securities. Subsequently, Merrigan again called me, and asked for the nature of the information I wanted. I gave it to him, and from that time until 5 February 1962 there were other conversations and an exchange of correspondence between us concerning clarification of information provided, and reminders of delays, and excuses and reasons for delays. On 5 February, Theodore Tannewald, Jr., Martin D. Ginsburg, Merrigan, and I, met at Merrigan's office, here in Washington, and discussed the case. Tannenwald and Ginsburg came down from New York City, and are members of the legal firm of Weil, Gotshal & Manges, 60 E. 42nd St., Ne York, N.Y. As a result of this discussion, I was given to understand that dividends declared and paid by Omar to its stockholders were deposited with a Swiss bank, which acted as paying agent for Omar. The bank was then, or later, identified as the Societe Commerciale de Laines. I now understand that although the Societe may be an existing organization, it is not a bank.

21 Subsequently, another Consent, form 872, was solicited, and received. On 9 May 1962 there was another meeting at which were present, Merrigan, Benjamin Clark, and I. Clark is also a member of Weil, Gotshal & Manges. I have subsequently twice met with Clark to discuss the case, and it was he who stated that if the Revenue Service persisted in the attempt to hold Omar to be a personal holding company, Omar would quite likely liquidate its holdings in the United States, and send the money out of the country. Partly in view of this warning I did not press this argument, but suggested that additional information be provided—particularly, the names and addresses of the shareholders of Omar, since even if the corporation had no further liability for United States taxes, the shareholders did—assuming them to be nonresident aliens.

In the course of my next meeting with Clark, which was in New York City, he asked if it would be possible to settle the case on the basis of holding Omar to be a personal holding company for the fiscal year ending in 1955, but only for that

year. He said that he had not discussed this idea with Omar, but wanted my reaction to it before proceeding further. He thought that Omar would be willing to incur a liability for about $100,000 of tax, and since no dividends had been paid to Omar's stockholders in 1955, the personal holding company issue seemed to be a valid one. I answered him carefully, saying that anything he or Omar wanted to discuss would be given careful consideration.

On 20 August 1962, Clark and Tannenwald appeared at this office; Tannenwald did not stay long, but Clark and I discussed additional information that he had brought along, and I asked for another power of attorney which would include him (this was later supplied). He asked again if we could settle on the basis he had previously suggested, but indicated that he had not yet discussed it with Omar—I gave him about the same answer as before.

Late in September, Clark called me to say that Omar had expressed a desire to continue in business in the United States, and wanted to settle this case on the basis of the informal proposition previously suggested. However, early in September I had learned that two more 1120NB's were in our Operational Research office, that they had been filed by GALLIA, S.A., using the same address as Omar. I inspected these returns, which were also claims for refund of a credit from a regulated investment company, and found that the signer of these returns apparently had also signed the Omar return. As soon thereafter as possible I returned to Lehman Bros., in New York City, and asked for information about their account with Gallia. From Lehman Bros., I learned that the Gallia account had been opened on 23 December 1958, and that since October 1961 Gallia, following a plan of liquidation of its securities, had a cash balance of $2,798,881.04 by February 1962, which, on 28 February 1962, was closed by issuance of a check to the First National City Bank for credit to their Montevideo office for the account of Gallia.

I was afraid to inquire about Omar's account after hearing this, for fear of arousing suspicion regarding the Service's prospective action. Accordingly, no inspection of Lehman's records regarding Omar was requested as that time (20 September 1962). I now know, of course, that Omar's holdings were already in process of being liquidated, and that large

sums of money had already been transferred out of Lehman Bros.

23 On my return to this office I began the preparation of the report of examination with a recommendation for a jeopardy assessment as a concomitant.

To the best of my knowledge Omar has filed no income tax returns, other than the Form 1120NB for 1957, referred to above.

William R. T. Gottlieb
WILLIAM R. T. GOTTLIEB.
31 October 1962.

Sworn to and subscribed before me this 31st day of October, 1962.

SARA B. MCGRANN,
Notary Public.

My Commission Expires May 1, 1966.

24 Affidavit of John H. Walker in support of temporary restraining order:

I, John H. Walker, am an employee of the Office of Internal Operations, Internal Revenue Service, Washington, D.C., in the capacity of Internal Revenue Agent. I presently reside at 9109 Braeburn Drive, Annandale, Virginia.

During the week of October 22–26, 1962, in New York, N.Y., I examined certain records of the following brokerage firms:

Lazard Freres & Co., 44 Wall Street, New York 5, N.Y.,
Abraham & Co., 120 Broadway, New York 5, N.Y., and
H. Hentz & Co., 72 Wall Street, New York 5, N.Y.

for the purpose of verifying the accuracy and completeness of Forms 1042 and 1042S filed by those firms for years 1960 and/or 1961, and for the additional purpose of determining any assets held by those companies in the name of Omar, S.A., 12 de Diciembre 789, Montevideo, Uruguay, and of certain individuals known or suspected of having some connection with Omar, S.A. My general approach was to select certain accounts for close scrutiny, prearranging the selection so as to include the account of Omar, S.A., in the sample. The records checked included, variously, customers' accounts or ledger sheets, customers' statements, ownership record cards, and dividend and withholding tax records. As to Omar, S.A., I found that its assets, consisting of securities, held by these brokerage houses, had been substantially liquidated during 1961 and 1962 and the proceeds removed from the United States.

25 More specifically, as to each brokerage firm:

Lazard Freres & Co. records reveal that at October 24, 1962, the following securities were held for Omar, S.A.;

7,448 shares Mineral & Chemical-Philipp Corp.
29,837 shares Cemento Andino, S.A.
Bonds Cemento Andino, S.A. (5% due 10/15/74) $117,500.00

The records further revealed that on June 23, 1961, an amount of $400,000.00 arising from sale of securities was paid to Omar, S.A. with the identification: "Pd. Belgian American Banking Corp. a/c Baco Italo Belge Montevideo for your account." (Note: "Moody's Bank and Finance Manual 1962" lists "Belgian-American Banking Corp. (New York)" at 52 Wall Street, New York 5, N.Y. No listing is shown for Baco (or Banco) Italo Belge, or Italian-Belgian Bank).

Also, the records showed that on December 8, 1961, an amount of $1,640,000.00 was paid to Omar, S.A. with the identification: "Transfer by wire to 1st National City Bank ofn y (sic) Montevideo credit for your acct." (Note: "Moody's Bank and Finance Manual 1962" lists 1st National City Bank of New York with downtown headquarters at 55 Wall St., New York, N.Y. and uptown headquarters at 399 Park Ave., New York, N.Y.) This payment left a debit balance of $783,375.92 in the account of Omar, S.A., which was cleared out by December 31, 1961 when the account showed a credit balance of $13,159.00 by further sales of securities.

Abraham & Co. records reveal that the securities held by that firm for Omar, S.A. were sold in January and February 1961 and that on February 23, 1961, a remittance of
26 $839,815.46 from those sales was made with the designation: "ck Belgian Am Bk ace Banco Italo Belga Montevideo." (Note: In this instance it appears that the "Belgian Am Bk" could be either of the following, listed in "Moody's Bank and Finance Manual 1962":

"Belgian-American Banking Corp. (New York), 52 Wall Street, New York, N.Y.," or.

"Belgian-American Bank & Trust Co. (N.Y.) (affiliated with Belgian-American Banking Corp., 52 Wall St., New York, N.Y.")

H. Hentz & Co. records showed that Omar, S.A. had had a small account consisting of F. W. Woolworth stock which paid $625.00 dividends for each of the first three quarters of 1961, but that account has been liquidated and no assets were held currently for Omar, S.A.

John H. Walker
JOHN H. WALKER.
October 31, 1962.

Sworn to and subscribed before me this 31st day of October, 1962.

SARA B. McGRANN,
Notary Public.

My Commission Expires May 1, 1966.

27 Affidavit of Forrest J. Kern in support of application for temporary restraining order:

I, Forrest J. Kern, Internal Revenue Agent, am an employee of Office of International Operations, Internal Revenue Service. I presently reside at 3614 Connecticut Avenue, N.W., Washington 8, D.C.

The withholding at source and certain customer account records of Lehman Brothers were examined during the week starting October 22, 1962. Purpose of the examination was to determine the accuracy of Form 1042 filed by Lehman Brothers and to determine the present assets of Omar, S.A., a Uruguayan corporation and certain individuals. The Form 1042 records of the withholding agent were inspected for 1960 and 1961. Form 1042 is the United States Annual Return of Income Tax to be Paid at Source.

The records of Lehman Brothers, 1 William Street, New York 4, N.Y., were examined on October 22, 23 and 24, 1962. Certain customers brokerage accounts, including Omar, S.A. were examined for the 1961 calendar year. The Omar account revealed numerous security sales on November 30, 1961 which increased their credit balance for this day from a low of $87,132.70 to a high of 0608,593.49. On December 1, 1961, $500,000.06 was withdrawn from the account. Notation opposite the withdrawal is, "Check to 1st National City Bank." The Omar account on September 28, 1962 indicates security sales totaling $177,549.79 resulting in a corresponding credit balance. The securities and cash held by Lehman

28 Brothers for Omar, S.A. on September 28, 1962 are as follows:

1300 shares Eastern States Corp. 6% 1$^1/_2$*		$18,850.00
5300 shares Mineral & Chemical-Philipp Corp. 6% 15$^1/_8$*		83,740.00
24M Plicoflex, Inc. 6% Sub notes 11-1-62 Regd		24,000.00
16	Do. Old	16,000.00
32	Do. New	*32,000.00
Cash		177,549.79
		$352,139.79

*Per New York Stock Exchange 10-25-62 closing.

Another account labeled Omar, S.A. #3 had "No securities long," as of September 28, 1962, with a $64.34 credit balance.

The latter account had lesser activity than the former and it was liquidated since December 31, 1961.

Forrest J. Kern,
FORREST J. KERN,
October 31, 1962.

Sworn to and subscribed before me this 31st day of October, 1962.

SARA B. McGEOWN,
Notary Public.

My Commission Expires May 1, 1966.

[File endorsement omitted]

In the United States District Court
for the Southern District of New York
62 Civ. 3603
[Title omitted]

Affidavit of John B. Lowe—Filed November 14, 1962

State of New York, County of New York, ss.:

JOHN B. LOWE, being duly sworn, deposes and says:

I am the Comptroller of defendant Belgian-American Banking Corporation and defendant Belgian-American Bank & Trust Company.

I submit this affidavit on behalf of the said defendants in opposition to the motion of the plaintiff for an order enjoining the said defendants from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of defendant Omar, S.A.

I have carefully checked the files and accounts of defendants Belgian-American Banking Corporation and Belgian-American Bank & Trust Company; and state as follows:

Neither Belgian-American Banking Corporation nor Belgian-American Bank & Trust Company has any property or rights to property belonging to defendant Omar, S.A. The
30 said banks presently have no accounts in the name of Omar, S.A. or in which our records indicate that Omar, S.A. has any right or interest. Neither of said banks has ever had any account of Omar, S.A.

I have read the papers submitted by the plaintiff to the Court in support of the motion for a restraining order, and particularly the two references to Belgian-American Banking Corporation. I have checked the files of Belgian-American Banking Corporation with respect to the two transactions mentioned, and state as follows:

1. According to the affidavit of John H. Walker, sworn to on October 31, 1962, $400,000 was paid to Belgian-American Banking Corporation by Lazard Freres & Co. on June 23, 1961. I have found a record of this transaction in the files of Belgian-American Banking Corporation. On June 23, 1961, Lazard Freres paid to Belgian-American Banking Corporation $400,000 for account of "Banco Italo-Belge, Montevideo for credit of Omar, S.A. under telegraphic advice". Banco Italo Belga S.A.

instructed Belgian-American Banking Corporation to transfer the $400,000 to Société de Banque Suisse, Geneva. The said sum was transferred to Société de Banque Suisse on June 27, 1961.

2. The affidavit of Mr. Walker states that Abraham & Co. paid $839,815.46 to Belgian-American Banking Corporation on February 23, 1961. I have checked the records of Belgian-American Banking Corporation with respect to this transaction. On February 27, 1961, Abraham & Co. delivered $839,815.46 to Belgian-American Banking Corporation for account of "Banco Italo Belga, Montevidieo for account of Omar, S.A. Geneva".

On March 3, 1961, pursuant to instructions received
31 from Banco Italo Belga S.A., Belgian-American Banking Corporation transferred the said $839,815.46 to Société de Banque Suisse.

It will appear from the above that in each of the two transactions cited by the plaintiff the funds were received by Belgian-American Banking Corporation but were immediately transferred, pursuant to instructions of Banco Italo Belga S.A., to Société de Banque Suisse, Geneva.

I respectfully submit that there is no occasion for the entry of a restraining order against either Belgian-American Banking Corporation or Belgian-American Bank & Trust Company.

JOHN B. LOWE.
John B. Lowe.

Sworn to before me this 2nd day of November, 1962.
John J. Kennedy
JOHN J. KENNEDY
Notary Public, State of New York, No. 31-7231150, Qualified in New York County. Commission Expires March 30, 1964.

32 [File endorsement omitted]

In the United States District Court for the Southern District of New York

62 Civ. 3603

[Title omitted]

Affidavit of David A. Campbell—Filed November 14, 1962

State of New York, County of New York:

DAVID A. CAMPBELL, being duly sworn, says:

1. I am an Assistant Vice-President of First National City Bank and I have been associated with the bank for 42 years. I have spent more than 15 years as an officer or inspector of foreign branches of the bank and I am familiar with their manner of operation.

2. I am presently located at the bank's Uptown Headquarters at 399 Park Avenue, and I make this affidavit for submission in opposition to the motion of the United States for a temporary restraining order, as requested in the order to show cause which was served on the bank on October 31, 1962. On the same day the bank was also served with a notice of levy and a notice of Federal tax lien, referring to the same indebtedness of Omar, S.A. for taxes as that mentioned in the affidavits attached to the order to show cause.

3. First National City Bank is a national banking as-
33 sociation having its principal office at 55 Wall Street in New York City, numerous branches in the State of New York, and 74 foreign branches located in 28 foreign countries throughout the world.

4. When the bank was served with the order to show cause, I caused an investigation to be made of the records of the bank in New York and found that Omar, S.A. is not a depositor of the bank either at Head Office or any domestic branch; and no record has been found in New York of any account at any foreign branch in this name.

5. Each foreign branch of the bank conducts its accounts independently of the account of other foreign branches and of its home office, as required by statute (Title 12, U.S. Code, § 604). Consequently, the bank does not have any records of

accounts at foreign branches and has no master list of depositors at foreign branches.

6. The affidavits attached to the order to show cause refer to records of Lazard Freres & Co. and of Lehman Brothers which mention First National City Bank in connection with a wire transfer and a check. No inferences can be drawn from those allegations, nor can the bank identify the transactions or the ultimate beneficiaries, without knowing to what bank the transfer instructions were given, and whether they were carried out; and without knowing on what bank the check was drawn, to which branch of First National City Bank the check was delivered, and what instructions accompanied the check.

DAVID A. CAMPBELL.

Sworn to before me November 8, 1962.

Barbara A. Flora.

BARBARA A. FLORA.

Notary Public, State of New York, No. 03–1255940, Qualified in Bronx County. Commission Expires March 30, 1963.

34 In the United States District Court for the Southern District of New York

62 Civ. 3603

[Title omitted]

Affidavit of John F. Fitzgerald—Filed November 14, 1962

State of New York, County of New York:

JOHN F. FITZGERALD, being duly sworn, says:

1. I am a Vice President of First National City Trust Company, which is a national banking association with offices in the City of New York. The trust company has no foreign branches.

2. I make this affidavit for submission in opposition to the motion of the United States for a temporary injunction as requested in the order to show cause served on the trust company on October 31, 1962. On the same day the trust company was served with a notice of levy and a notice of Federal tax lien, referring to the same indebtedness of Omar, S.A. for taxes as that mentioned in the affidavit attached to the order to show cause.

3. An examination of the records of the trust company fails to reveal that the trust company holds any property of or is indebted to Omar, S.A.

JOHN F. FITZGERALD.

Sworn to before me November 8, 1962.

Katherine Wendel.

KATHERINE WENDEL.

Notary Public, State of New York, Qualified in New York County, No. 31-4222750, Cert. filed with City Register N.Y. County. Commission Expires March 30, 1963.

35 [Acknowledgment of service omitted in printing.]

36 [File endorsement omitted]

In the United States District Court for the Southern District of New York

62 Civil 3603

UNITED STATES OF AMERICA, PLAINTIFF

against

OMAR, S.A., A URUGUAYAN CORPORATION; LAZARD FRERES & CO., LEHMAN BROTHERS, BELGIAN-AMERICAN BANKING CORP., BELGIAN-AMERICAN BANK & TRUST CO., FIRST NATIONAL CITY BANK OF NEW YORK AND FIRST NATIONAL CITY TRUST CO., DEFENDANTS

Appearances:

Vincent L. Broderick, Esq., United States Attorney, Southern District of New York, *Morton L. Ginsberg, Esq.*, Assistant United States Attorney, Of Counsel.

Sullivan & Cromwell, Esqs., of New York, N.Y., Attorneys for Belgian-American Banking Corp. and Belgian-American Bank & Trust Company.

Shearman & Sterling, Esqs., of New York, N.Y., Attorneys for First National City Bank and First National City Trust Co., *Henry Harfield, Esq.*, Of Counsel.

37 *Opinion—November 14, 1962*

DAWSON, D.J.:

This is a motion for a preliminary injunction to restrain the defendants Lazard Freres & Co., Lehman Brothers, Belgian-American Banking Corp., Belgian-American Bank & Trust Co., First National City Bank of New York and First National City Trust Co. from selling, transferring, pledging, encumbering, disposing of or distributing any property or rights to property of defendant taxpayer Omar, S.A. A temporary restraining order was issued against the defendants on October 31, 1962, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure.

It appears from the complaint and affidavits in support of the motion that a corporate income tax deficiency totaling $19,269,156.87 has been assessed against the defendant Omar, a Uruguayan corporation. It further appears that this assess-

ment is secured by a federal tax lien upon all property and rights to property of the defendant taxpayer.

The plaintiff claims that the principal assets of the defendant corporation consist of sums, credits, stocks and bonds which are now held by the defendant banks and brokerage houses, or by their agents, branches, or nominees both within and without the United States. The plaintiff claims that disposi-
38 tion of the aforementioned assets might make its lawful rights therein unenforceable and that it would be irreparably injured by removal of any such assets outside the power of the court.

The affidavits of the plaintiff show an intent to liquidate, and in fact, substantial liquidations of the defendant Omar's accounts within the United States and transfer of the proceeds outside of the territorial jurisdiction have occurred. It therefore appears that there is a clear and present danger that plaintiff may be unable to recover upon defendant Omar's tax liability.

Section 7402(a) [26 U.S.C. § 7402] of the Internal Revenue Code, pursuant to which the Government's claim is brought, provides that the court shall issue such writs and orders as are appropriate to enforce the internal revenue laws. The court has the power, under Rule 65 of the Federal Rules of Civil Procedure, to grant a preliminary injunction and such power is discretionary. *American Visuals Corp.* v. *Holland*, 219 F. 2d 223, 224 (2d Cir. 1955), and cases cited therein.

The court is given the equitable power to issue a preliminary injunction so as to prevent irreparable injury pending
39 the determination of an action. *Ohio Oil Co.* v. *Conway*, 279 U.S. 813 (1928). In the instant case if the United States is successful in establishing defendant Omar's tax liability it will be needlessly injured if recovery is prevented by further removal of defendant's assets from the jurisdiction of the court. Such injury clearly authorizes the court to exercise its equitable power. *United States* v. *Ross*, 302 F. 2d 831 (2d Cir. 1962).

The defendant First National City Bank does not oppose the application of the injunction domestically, but argues that it should not be made applicable to its foreign branches. The crux of defendant's arguments is that the court has no power over property held or payable in branch banks outside the United States. This argument, though possibly well founded,

is not entirely to the point, since an injunction does not operate *in rem*. While it is true that the court may have no effective power over persons outside its jurisdiction, there is no problem where the persons to be enjoined are within its jurisdiction. Here the court has personal jurisdiction over the officers of the bank within the United States, and its power against them may be effectively exercised.

40 It is well established that once the court has obtained personal jurisdiction over a party it may compel performance of acts with respect to property located within or without its jurisdiction. *United States* v. *Ross*, 302 F. 2d 831 (2d Cir. 1962); *First National City Bank of N.Y.* v. *Internal Revenue Service*, 271 F. 2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960).

In the *First National Bank* case, *supra*, the question of the applicability of process against the foreign branches of a national bank against which such process was issued was clearly decided. In that case the Court of Appeals held that a national bank was required to produce records of its Panamanian branch pursuant to a summons served upon its home office.

The court should not act so as to violate laws of friendly foreign countries. *Inge* v. *Ferguson*, 282 F. 2d 149, 152 (2d Cir. 1960). Where it is shown that compliance with the court order would violate foreign law, then such order should be modified. *Application of Chase Manhattan Bank*, 297 F. 2d 611 (2d Cir. 1962). In the instant case it is indicated by one defendant that there may be a violation of foreign law

41 if the assets of foreign branches are frozen, but no proof of any such law has been presented. It is proper therefore to permit the injunction to issue, and if it can be shown that compliance would violate local law the injunction may then be modified.

Although the defendants did not argue the control issue, this was the main brunt of plaintiff's memorandum. Suffice to say that if the court's order is violated and the defendants seek to escape punishment by claiming lack of authority over their foreign branches, it would be incumbent upon them to prove such defense to the satisfaction of the court.

The defendants Belgian-American Banking Corp., Belgian-American Bank & Trust Co., First National City Bank of New York and First National City Trust Co. have submitted affidavits that they do not now hold any property or rights to

property of defendant Omar. However, with the apparent exception of the First National City Trust Co. and Belgian-American Bank & Trust Co. all have had some connection with the transfer of defendant's property and there is no showing that their branches or agents do not at present hold any of defendant's assets. There is, therefore, sufficient reason to enjoin all the defendants except First National City Trust Co. and Belgian-American Bank & Trust Co.

42 During the oral argument on the motion the defendant Lehman Brothers raised the question of whether the accounts affected by the order could be indicated with particularity. It would seem the proposed order directed at the property of Omar, S.A. is of sufficient particularity on its face.

Submit injunction in accordance with this decision.

Dated: New York, N.Y., November 14, 1962.

ARCHIE O. DAWSON,
U.S.D.J.

43 In the United States District Court for the Southern District of New York

62 Civ. 3603

UNITED STATES OF AMERICA, PLAINTIFF

against

OMAR, S.A., A URUGUAYAN CORPORATION; LAZARD FRERES & CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK & TRUST CO.; FIRST NATIONAL CITY BANK OF NEW YORK; AND FIRST NATIONAL CITY TRUST CO., DEFENDANTS

Injunction—November 20, 1962

Plaintiff, United States of America, having moved this Court, by an Order to Show Cause granted by this Court on October 31, 1962, for a preliminary injunction against defendants, and said application having come on to be heard before me on November 5, 1962, and plaintiff having appeared in support of said application by Vincent L. Broderick, Esq., United States Attorney for the Southern District of New York, Morton L. Ginsberg, of counsel, and defendant, Lehman Brothers, having appeared in opposition thereto by Simpson, Thacher & Bartlett, Esqs., and defendants, First National City Bank of New York and First National City Trust Co. having appeared by Shearman & Sterling, Esqs., and having submitted an affidavit and memorandum in opposition, and defendants, Belgian-American Banking Corp. and Belgian-American Bank & Trust Co. having appeared in opposition by Sullivan & Cromwell, Esqs., and having submitted an affidavit in opposition, and due deliberation thereon having been had, and this Court having rendered a decision contained in a written opinion
44 filed on November 14, 1962, which opinion fully sets forth the findings and reasons for the issuance of an injunction herein, and which opinion is herein incorporated by reference.

Now, on motion of Vincent L. Broderick, Esq., United States Attorney for the Southern District of New York, attorney for plaintiff, and upon plaintiff's verified complaint herein, plaintiff's application for the preliminary injunction, and the affida-

vits annexed thereto, and upon all papers heretofore filed herein, it is

ORDERED, that pending the determination of this action or until further order of this Court, the defendants, Lazard Frères & Co., Lehman Brothers, Belgian-American Banking Corp. and First National City Bank of New York, or any of them, be and they are hereby restrained from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of Omar, S.A., including, but not limited to any sums, credits, stock, or bonds or any interest, dividends, or other earnings thereon now held for or for the account of the said Omar, S.A., by them or by any of their branches, agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not.

Dated: New York, New York, November 20, 1962, 4:30 p.m.

ARCHIE O. DAWSON,
U.S.D.J.

45 [Service omitted in printing.]

46 [File endorsement omitted]

In the United States District Court
for the Southern District of New York

62 Civ. 3606

[Title omitted]

Notice of Appeal—Filed December 4, 1962

NOTICE IS HEREBY GIVEN that defendant First National City Bank, sued herein as "First National City Bank of New York", hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the order herein, dated and entered November 20, 1962, granting an injunction, as relates to deposits of cash or securities standing on the books of, and payable or deliverable at, branches of First National City Bank located outside the United States.

Dated: New York, N.Y., December 4, 1962.

Yours, etc.,

SHEARMAN & STERLING,
Attorneys for Defendant, First National City Bank.
By CHARLES C. PARLIN, JR.,
A Member of the Firm, 20 Exchange Place, New York 5, N.Y.

To: VINCENT BRODERICK, ESQ.,
United States Attorney for the Southern District of New York, Attorney for Plaintiff, United States Courthouse, Foley Square, New York, N.Y.

47 [File endorsement omitted]

In the United States District Court
for the Southern District of New York

62 Civ. 3603

[Title omitted]

Amendment to complaint—Filed December 12, 196.

The United States of America, plaintiff herein, by its attorney, Robert M. Morgenthau, United States Attorney for the Southern District of New York, for its amendment to the complaint herein alleges the following additional facts with respect to the enumerated paragraphs:

IV

(h) The defendant, Swiss Bank Corporation, is a Swiss corporation which has a New York agency which is located at 15 Nassau Street, New York, New York.

XIV

The defendant, Lehman Brothers also presently hol[illegible]cks, bonds, and securities in the following four accounts under the name of the Swiss Bank Corporation, which, on information and belief, are nominee accounts which actually belong to the defendant, Omar, S.A.: Swiss Bank Corporation Ref Cologny; Swiss Bank Corporation Ref Veyrier; Swiss Bank Corporation Ref Veyrier S' D 92636; Swiss Bank Corporation Regular AC. The said stocks, bonds and securities are encumbered by the federal tax lien against all property and rights to property of the defendant, Omar, S.A.

48 WHEREFORE, in addition to the relief prayed for in the complaint filed herein, plaintiff prays:

1. That this Court find, determine and adjudge that the property in the four accounts described in paragraph XIV hereinabove is the property of the defendant-taxpayer, Omar, S.A.;

2. That pending the determination of this suit, this Court enjoin the defendants Lehman Brothers and Swiss Bank Corporation from selling, transferring, pledging, disposing of or distributing any of the stocks, bonds, and securities or the divi-

dends, interest, or other earnings thereon in the four accounts described in paragraph XIV hereinabove;

3. That this Court order the foreclosure of the plaintiff's lien on the property in the four accounts described in paragraph XIV hereinabove and that this Court order the said property to be sold at a judicial sale in accordance with law and the proceeds therefrom to be turned over to this plaintiff in satisfaction of this plaintiff's lien on said property;

4. That this Court grant this plaintiff such other and further relief that it deems is just, equitable and proper in the premises including costs.

ROBERT M. MORGENTHAU,
United States Attorney for the Southern District of New York; Attorney for Plaintiff.
By MORTON L. GINSBERG,
Assistant United States Attorney, Office and Post Office Address: United States Court House, Foley Square; New York 6, N.Y., Tel. COrtlandt 7-7100

49 [Affidavit of mailing omitted in printing.]

50 [Clerk's Certificate to foregoing transcript omitted in printing.]

51 In the United States Court of Appeals
for the Second Circuit

No. 307—September Term, 1962

Argued April 11, 1963

Docket No. 27980

UNITED STATES OF AMERICA, APPELLEE

v.

FIRST NATIONAL CITY BANK, APPELLANT

and

OMAR, S. A., A URUGUAYAN CORPORATION; LAZARD FRERES & CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; AND FIRST NATIONAL CITY TRUST CO., DEFENDANTS

Before MOORE, FRIENDLY and HAYS, Circuit Judges

Appeal from an injunction issued by the United States District Court for the Southern District of New York, Archie O. Dawson, Judge, enjoining the transfer of funds held by the defendant's branch bank abroad for the account of an alleged delinquent taxpayer. Vacated in part and remanded.

52 *Henry Harfield* of Shearman & Sterling (Herman E. Compter and John E. Hoffman, Jr., of counsel), for appellant.

Louis F. Oberdorfer, Assistant Attorney General (Robert M. Morgenthau, United States Attorney, Southern District of New York, Morton L. Ginsberg and Robert Arum, Assistant United States Attorneys, Harold C. Wilkenfeld, Michael A. Mulroney and John J. McCarthy, Attorneys, Department of Justice, Washington, D.C., of counsel), for appellee.

Opinion—Decided June 26, 1963

MOORE, *Circuit Judge:* This appeal presents an important question concerning the scope of an injunction against an American bank affecting deposits that may be held for the credit of an alleged delinquent taxpayer in a branch bank outside of the United States.

The taxpayer involved is Omar, S.A., a Uruguayan corporation. An investigation into Omar's affairs in this country revealed the likelihood that Omar was indebted to the United

States for unpaid taxes and that sometime in June, 1961, Omar commenced a program of liquidating its holdings of securities in this country and transferring the receipts to Uruguay.[1]

53 On October 31, 1962, the Internal Revenue Commissioner caused the issuance of jeopardy assessments against the taxpayer for deficiencies in corporate income tax totaling about $19,300,000 for the fiscal years March 31, 1955, through 1961, inclusive. Notice of the assessment and demand for payment was sent to Omar.

On the same day the United States filed a complaint in the District Court for the Southern District of New York naming as defendants Omar S.A.; two banks, The First National City Bank of New York and Belgian-American Banking Corp.; two brokerage houses, Lazard Freres & Co. and Lehman Bros.; and two trust companies, First National City Trust Co. and Belgian-American Bank & Trust Co. The complaint alleged that defendants, other than Omar, held sums for the account of or to the credit of Omar and prayed that the District Court adjudge Omar indebted to the government for unpaid taxes; find a valid lien existing in favor of the plaintiff on all property or rights to property belonging to the defendant Omar; enjoin the other defendants from in any way transferring or disposing of such property; order the return of all such property to the jurisdiction of the court; and order the foreclosure of plaintiff's lien on any such property held by defendants and its judicial sale. No personal jurisdiction has been obtained over the taxpayer Omar. An application for a temporary restraining order was granted on October 31, 1962, and on November 20, 1962, the district court, after hearing both sides, granted a preliminary injunction enjoining certain defendants from transferring or disposing of any property or rights to property, whether or not located within the United States, held

---

[1] An affidavit submitted by John H. Walker, an employee of the Office of International Operations, Internal Revenue Service, states that an investigation of the records of Lazard Fréres & Co. revealed that on June 23, 1961, Omar was paid $400,000 with the notation, "Pd Belgian American Banking Corp. a c Baco Italo Belge Montevideo for your account" and on December 8, 1961, $1,640,000 was paid to Omar with the notation, "Transfer by wire to 1st National City Bank cofn y (sic) Montevideo credit for your account." An affidavit submitted by Forrest J. Kern of the same office reveals a withdrawal from Omar's account with Lehman Brothers of $500,000 with the notation "check to 1st National City Bank."

for the account of Omar by defendants, their branches, agents or nominees.[2]

54 Defendant First National City Bank of New York [hereinafter referred to as "Citibank"] appeals from so much of the order as applies to property or rights to property that it may hold in branch banks outside the United States.[3] Citibank's argument on appeal is that under New York law, a deposit in its branch bank would not be collectible by Omar in New York, Omar's sole right being against any branch bank in which such deposits have been made; that, there being no debt in the United States, there is no property or right to property to which a federal lien can attach; and that the district court was without jurisdiction to issue an injunction affecting any such deposits. The Government in turn asserts that Citibank is itself the debtor and that a lien attached to this debt in New York; that the federal lien attached even if the situs of the debt be outside the United States; and that in any event, personal jurisdiction over Citibank was sufficient basis for the issuance of the injunction.

I

To put these contentions in their proper perspective, a short summary of the enforcement provisions of the Internal Revenue Code of 1954 and judicial decisions thereunder is appropriate. The Code provides several alternative methods for
55 the collection of the revenue from those who neglect
56 or refuse to pay.[4] Sections 6321 and 6322, 28 U.S.C., provide that a lien upon "all property and rights to

[2] The defendants Belgian-American Banking Corp. and First National City Trust Co. filed uncontroverted affidavits alleging that they held no property or rights to property belonging to the taxpayer. Therefore, they were excluded from the order issued by the court.

[3] Jurisdiction over this appeal from the granting of a preliminary injunction lies under 28 U.S.C. § 1292(1). In reviewing the preliminary injunction, this court may inquire into the jurisdiction of the district court as well as into the adequacy of the complaint for the injunction cannot stand if the complaint itself cannot stand. *Deckert v. Independence Corp.*, 311 U.S. 282 (1940); *John Hancock Mutual Life Ins. Co. v. Kraft*, 200 F. 2d 952 (2d Cir. 1953); *Pong Yan Moy v. Republic of China*, 201 F. 2d 195 (D.C. Cir. 1952), cert. denied, 345 U.S. 925 (1953); *Eighth Regional War Labor Board v. Humble Oil & Refining Co.*, 145 F. 2d 462 (5th Cir. 1944), cert. denied, 325 U.S. 883 (1945).

[4] The relevant sections provide:

property" belonging to a taxpayer who has refused or neglected to pay any tax arises at the time an assessment is made. In addition, the Service is authorized to collect such tax by

---

§ 6321. *Lien for Taxes.*

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

§ 6322. *Period of Lien.*

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

§ 6331. *Levy and Distraint.*

(a) Authority of Secretary or Delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * * If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

§ 6332. *Surrender of Property Subject to Levy.*

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty for Violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

§ 7402. *Jurisdiction of District Courts.*

(a) To Issue Orders, Processes, and Judgments.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other

levy on all property or rights to property either belonging to the taxpayer or on which there is a lien. 28 U.S.C. § 6331(a). Any person in possession of property or rights to property on which a levy has been made who fails to surrender such property to the Service on demand is personally liable in a sum equal to the value of the property or rights not surrendered. 28 U.S.C. § 6332(b).

The statutory scheme also provides for resort to the courts if necessary. Section 7403(a) permits the filing of a civil action in the district court to enforce a federal tax lien, whether or not levy has also been made. In addition, the district courts have jurisdiction to issue all orders or
57 injunctions necessary or appropriate for the enforcement of the internal revenue laws. 28 U.S.C. § 7402(a).

The effect of the foregoing provisions is to create a statutory attachment or garnishment without requiring resort to the court processes normally necessary in ordinary garnishment proceedings. *United States* v. *Eiland*, 223 F. 2d 118 (4th Cir. 1955). Where for some reason personal jurisdiction over the delinquent taxpayer is unobtainable, the Service is able to proceed in actions quasi in rem to enforce its lien on specific property belonging to the taxpayer within the jurisdiction of the court. See *United States* v. *Balanowski*, 236 F. 2d 298 (2d Cir. 1956), cert. denied, 352 U.S. 968 (1957).

The crucial question here is whether appellant holds property or rights to property of the taxpayer Omar subject to the jurisdiction of the district court.[5] The nature of Omar's right against Citibank arising out of a deposit made in Citibank's

---

orders and processes, and to render such judgment and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

§ 7403. *Action to Enforce Lien or to Subject Property to Payment of Tax.*

(a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title or interest, to the payment of such tax or liability.

[5] For the sake of brevity, future references in this opinion to "property belonging to the taxpayer" are to be taken to include "rights to property" as well.

Montevideo branch bank is to be determined by state law for the tax lien statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States* v. *Bess*, 357 U.S. 51, 55 (1958); see *Aquilino* v. *United States*, 363 U.S. 509 (1960); *Raffaele* v. *Granger*, 196 F. 2d 620 (3d Cir. 1952).

The proper place to sue to enforce a lien is in the district in which the property is located. *United States* v. *Dallas National Bank*, 152 F. 2d 582 (5th Cir. 1945). Absent jurisdiction over the person of Omar, this action can proceed only on the ground that Citibank's debt to Omar is within the jurisdiction of the district court. *Hanson* v. *Denckla*, 357 U.S. 235 (1950), made explicit what had been assumed since *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1877), namely, that a state has no right "to enter a judgment purporting to extinguish the interest of such a person [over whom it has no personal jurisdiction] in property over which the court has no jurisdiction." 357 U.S. at 250.

58

The Government argues that the situs of the debt is irrelevant because a bank account creates a debtor-creditor relationship which is subject to levy. *United States* v. *Bowery Savings Bank*, 297 F. 2d 380 (2d Cir. 1961); *United States* v. *Manufacturers Trust Co.*, 198 F. 2d 366 (2d Cir. 1952); *United States* v. *Third National Bank & Trust Co.*, 111 F. Supp. 152 (M. D. Pa. 1953), and that, therefore, jurisdiction exists in the district court because the "obligation of the debtor to pay clings to and accompanies him wherever he goes." *Harris* v. *Balk*, 198 U.S. 215, 222 (1905). Although the Government correctly characterizes the relationship between bank and depositor, its argument merely begs the determinative question, namely, who is the actual debtor in this case, the appellant or its branch banks. The nature of garnishment proceedings is such that the garnishor obtains no greater right against the garnishee than the garnishee's creditor had. *Harris* v. *Balk*, *supra*, at 222; *Karno-Smith Co.* v. *Maloney*, 112 F. 2d 690, 692 (3d Cir. 1940); *Wheeler* v. *Thomas*, 31 F. Supp. 702 (D.C.D.C. 1940). But *cf. United States* v. *Manufacturers Trust Co.*, *supra*. Thus, only if Omar could sue appellant in New York to recover his deposit, can the Government, as Omar's creditor, sue in New York. Inquiry, therefore, must be made into the nature of the debt owed to Omar under state law.

A review of the New York cases indicates a consistent line of authority holding that accounts in a foreign branch bank are not subject to attachment or execution by the process of a New York court served in New York on a main
59 office, branch or agency of the bank. See Comment, Garnishment of Branch Banks, 56 Mich. L. Rev., 90 (1957). This doctrine finds its inception in English law. An important case is *Richardson* v. *Richardson & National Bank of India, Ltd.*, [1927] Probate 228, 137 L.T. R492, 163 L.T. 450, involving an attempt by a wife to obtain a garnishee order against the account of her husband in a bank whose head office was in London. The question presented was whether the garnishee order could extend to deposits to the husband's credit in branch banks in Kenya and Tanganyika. The Court, after reviewing prior English authorities such as *Woodland* v. *Fear*, 7 E. & B. 519 (1857) and *Rex* v. *Lovitt*, [1912] A.C. 212 (P.C.), found that the contractual obligation between bank and customer contains certain implied terms, these being that (1) the promise of the bank is to repay at the branch where the account is kept; and (2) the bank is not required to pay until payment is demanded at the branch where the account is kept. Therefore, since the debt of the bank at its main office did not extend to deposits in its branch banks, it was not property within the jurisdiction of the English court and was not subject to attachment there.

An early case in New York *Chrzanowska* v. *Corn Exchange Bank*, 173 App. Div. 285, 159 N.Y.S. 385 (1st Dep't 1916), affirmed, 225 N.Y. 728, 122 N.E. 877 (1919), dealing with the relationship between branch banks, established the proposition that domestic branches within the same city were to be regarded as distinct and separate entities and that deposits made in branch banks are payable there and only there. The court said: "the different branches were as separate and distinct from one another as from any other bank." 173 App. Div. at 291, 159 N.Y.S. at 388. But see *Konstantinidis* v. *The S.S. Tarsus*, 196 F. Supp. 433 (E.D.N.Y. 1961). This view
60 was thereafter applied to foreign branches with respect to the collection of forwarded paper, the court stating that "the branch is not a mere 'teller's window'; it is a separate business entity." *Pan-American Bank & Trust Co.* v. *National City Bank*, 6 F. 2d 762, 767 (2d Cir.), cert. denied, 269 U.S. 554 (1925). Furthermore, the contract between the

bank and a depositor in a foreign branch is to pay in the currency of the branch in which the deposit is made. *Solokoff* v. *National City Bank*, 250 N.Y. 69, 164 N.E. 745 (1928); *Zimmerman* v. *Hicks*, 7 F. 2d 443 (2d Cir. 1925), affirmed sub nom. *Zimmermann* v. *Sutherland*, 274 U.S. 253 (1926). The separate entity theory is subject only to the exception that if the branch be closed or if demand for payment is refused at the branch, an action against the main office will lie. *Solokoff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924); *Richardson* v. *Richardson & National Bank of India, Ltd.*, *supra*.*

Bluebird Undergarment Corp. v. *Gomez*, 139 Misc. 742, 249 N.Y.S. 319 (City Ct., N.Y. Cty. 1931), dealt with the scope of a warrant of attachment served on the main office of a bank located in New York involving an account of a defendant outside the United States. The issue arose on a motion to compel the bank to produce information showing whether the defendant had any sums on account in the bank's Puerto Rico branch. Relying on the separate entity theory espoused in *Richardson* and *Chrzanowska*, the court found that the defendant could not have commenced an action in New York to recover his deposit in Puerto Rico. The court in its opinion said:

> "Not only are branch banks separate entities, but deposits made in a branch bank are payable
> 61 there and there only * * *. A branch bank being separately indebted to its depositor, the existing obligation lies primarily between such branch bank and its depositor. The conclusion follows as a necessary corollary that the debt owed by a branch finds its situs within the territorial jurisdiction of such branch."

139 Misc. at 744, 249 N.Y.S. at 321-22. See also *Phillip* v. *Chase National Bank*, 34 N.Y.S. 2d 465 (Sup. Ct., N.Y. Cty. 1942); *Walsh* v. *Bustos*, 46 N.Y.S. 2d 240 (City Ct., N.Y. Cty. 1943).

In *Clinton Trust Co.* v. *Compania Azucarera Central Mabay S.A.*, 172 Misc. 148, 14 N.Y.S. 2d 743 (Sup. Ct., N.Y. Cty., affirmed without opinion, 258 App. Div. 780 (1st Dep't 1939)), the court was faced with an application to direct Chase Na-

* For a discussion of the legal problems arising out of the growth of branch banking, see Fordham, Branch Banks as Separate Entities, 31 Colum. L. Rev. 975 (1931).

tional Bank and the Royal Bank of Canada to answer certain questions concerning the status of deposit accounts of the defendant in their branch banks in Havana, Cuba. In denying the application, the court relied on the authorities already discussed, but found additional support for its conclusion with respect to Chase in 12 U.S.C. § 604. That section provides that:

> "Every national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item."

See also *Pan-American Bank & Trust Co.* v. *National City Bank*, *supra*.

Later cases in New York, while still resting on the sep-
62 arate entity theory, have stressed the policy justifications underlying the rule. In *Cronan* v. *Schilling*, 100 N.Y.S. 2d 474, 476 (Sup. Ct., N.Y. Cty. 1950), the Court stated:

> "Unless each branch of a bank is treated as a separate entity for attachment purposes, no branch could safely pay a check drawn by its depositor without checking all other branches and the main office to make sure that no warrant of attachment had been served upon any of them. Each time a warrant of attachment is served upon one branch, every other branch and the main office would have to be notified. This would place an intolerable burden upon banking and commerce, particularly where the branches are numerous, as is often the case."

Similarly in *Newton-Jackson Co.* v. *Animashun*, 148 N.Y.S. 2d 66 (Sup. Ct., Nassau Cty. 1955), the court found that the rule rested on two grounds: (1) the situs of the debt is at the branch where the account is carried; (2) the crippling effect a contrary rule would have on banking practice involving branch banks in distant corners of the globe.

Most recently, the rule has received the sanction of the New York Court of Appeals in *McCloskey* v. *Chase Manhattan Bank*, 11 N.Y. 2d 936 (1962), which was an action to recover (by attachment) in New York moneys payable at a branch of

the New York bank in Germany. The funds were held not to be subject to New York attachment. The Court of Appeals, without opinion, affirmed the judgment granting defendant's motion to dismiss the complaint.

The Government seeks to vitiate the effect of these cases by contending that they relate merely to state-imposed
63 restrictions upon the remedy of a creditor of a depositor, stressing the fact that none of these cases involved an actual attempt by a depositor to demand payment in New York of a deposit made in a branch bank abroad.[7] Relying on *United States* v. *Bess*, *supra*, it argues that state-created restrictions on enforcement remedies are inoperative to prevent the attachment or enforcement of federal tax liens.[8]

This argument fails to recognize the full import of the New York cases. The reason that attachment fails is in no way due to any peculiar vagaries in the attachment remedy itself; rather, it is the result of the New York substantive rule that there is no obligation due at the main branch to a depositor in another branch and, therefore, no property subject to
64 attachment within the jurisdiction of the New York courts.[9] Furthermore, the policy justifications offered

[7] *Varga* v. *Credit-Suisse*, 2 App. Div. 2d 598, 157 N.Y.S. 2d 391 (1st Dep't 1956) is urged by the Government as authority for the proposition that a depositor may sue a New York branch of a foreign bank with respect to an account in another foreign branch of the bank. However that case involved a suit for breach of contract arising out of the alleged wrongful transfer of funds deposited in a Hungarian branch. The sole question decided there was that § 200, sub. 3 of the New York Banking Law, did not prevent a suit against an agent of a foreign bank in New York where the cause of action arose outside of New York. In addition, although the question was not reached by the court, it is possible that the action might be governed by the rule of *Solokoff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), which permitted an action against the main office where payment had been refused at a branch office. Here, since the funds had allegedly been transferred, no demand would even be necessary. *Cf. Solokoff* v. *National City Bank*, 250 N.Y. 69, 80-81, 164 N.E. 745, 749 (1928).

[8] In *Bess* after holding that the federal lien did not attach to the proceeds of an insurance policy on the life of the insured but only to the cash surrender value of the policy, the Court rejected the contention that no federal lien attached to the cash surrender value because under state law that property right was not subject to creditors' liens. Once it was determined under state law that a property right existed in the insured taxpayer, the state attachment law became irrelevant.

[9] Further support for this conclusion can be garnered from the refusal of the New York courts to extend § 916(3) of the New York Civil Practice

to support the rule rest not on the inappropriateness of attachment as a remedy, but on the more fundamental notion that to require any branch to respond to the demand of a depositor in another branch anywhere in the world would impose an intolerable burden on the banking community. This would be the result of not only the impracticality of requiring constant transmission of reports on the status of accounts in one branch to all other branches, but on the complications that arise out of the fact that different branches may be subject to the laws of other countries and may be dealing in different currencies.[10]

65 The Government also places some reliance on the rejection of the separate entity theory, based on 12 U.S.C. § 604, in *First National City Bank* v. *Internal Revenue Service*, 271 F. 2d 616 (2d Cir. 1959). There this Court held that this section was not a bar to requiring the bank to produce bank records, physically located in its branch bank in Panama, relating to an account of a Panama corporation. There are two ready answers to this contention. In the first place, in only one New York case has there even been partial reliance on 12 U.S.C. § 604. See *Clinton Trust Co.* v. *Campania Azucarera Central Mabay S.A.*, *supra*. Secondly, *First Na-*

Act to these cases. See *Cronan* v. *Schilling*, 100 N.Y.S. 2d 474 (Sup. Ct., N.Y. Cty. 1950); Casenote, Branch Banking as Separate Entity for Attachment Purposes, 48 Cornell L.Q. 333 (1963). That section provides for attachment upon:

"a debt, arising under or on account of a contract • • • due • • • to a resident or non-resident person or corporation, from a resident or non-resident person or corporation, upon whom or which service of process may be had within the county, provided that an action could be maintained by the defendant within the state for the recovery of such debt at the maturity thereof or where the debt consists of a deposit of money not to be repaid at a fixed time but only upon special demand, that such demand therefor could be duly made by defendant within the state."

If the substantive law of the state were, as the Government urges, that a depositor in a foreign branch could demand payment at a New York branch, then § 916(3) by its terms would be applicable to the case of attachment by a creditor of the depositor. The section is, however, inapplicable only because the state rule is that a depositor could not successfully demand payment in New York.

[10] Problems arising out of the fact that different branches deal with different currencies include questions of the possible necessity of securing a license in order to convert the foreign currency into American dollars, the effective date for determination of the rate of exchange and the selection of the proper exchange rate when multiple exchange rates are in force.

tional City did not reject the separate entity theory for all purposes and under all circumstances. Thus, this Court there recognized that a prior decision in this Circuit, *Pan-American Bank & Trust Co.* v. *National City Bank*, *supra*, which relied in part on § 604, had held that "in various commercial transactions between a branch bank and its home office the rights involved are to be determined as though the branch was acting at arm's length as an independent entity." *First National City Bank* v. *Internal Revenue Service*, *supra*, at 619. The court in no way intimated disapproval of the *Pan-American* opinion; it merely found that the case at bar, involving a question of whether the main office had sufficient control over its branch to order the return of certain records for examination, was distinguishable from the arm's length transaction involved in *Pan-American*.

II

The court below rested its decision to issue the injunction on the grounds that the court having personal jurisdiction over Citibank, it had the power to compel the performance of
66 acts respecting property situated outside its jurisdiction.

The district court relied on cases sustaining the power of the district court to require the production of records held in branch banks pursuant to a summons served upon its home office.[11] *First National City Bank* v. *Internal Revenue Service*, *supra*; *Application of Chase Manhattan Bank*, 297 F. 2d 611 (2d Cir. 1962). But *cf. Ings* v. *Ferguson*, 282 F. 2d 149 (2d Cir. 1960). Furthermore, in *United States* v. *Ross*, 302 F. 2d 831 (2d Cir. 1962) the power of a district court to order the taxpayer, over whom personal jurisdiction had been obtained,

[11] A recurring problem in these cases is the effect that is to be given to the fact that compliance with the production order may subject the party or witness to civil liability or criminal penalties under the law of the country in which the records are located. Under these circumstances, the burden of proceeding by appropriate process in the courts of the foreign country shifts to the party seeking production, with some vague duty on the part of the person subpoenaed to cooperate in this endeavor. See Note, Subpoena of Documents Located in Foreign Jurisdiction Where Law of Situs Prohibits Removal, 37 N.Y.U.L. Rev. 295 (1962). Similar assertions were made by the defendants in this case. The court below held that defendants had failed to offer any proof on the applicable foreign law, but if it were later shown that compliance would violate foreign law, the injunction could be modified accordingly.

to transfer stock certificates, located in the Bahamas, to a receiver appointed by the district court, was upheld. See also *S.E.C.* v. *Minas de Artemisa, S.A.*, 150 F. 2d 215 (9th Cir. 1945).

Here, however, the absence of personal jurisdiction over the taxpayer Omar is a crucial factor in distinguishing the *Ross* case. Since Omar was not before the court, no personal judgment could have been rendered against it. Only a judgment *quasi in rem* extinguishing Omar's rights in any property it might have within the district court's jurisdiction would be valid. A prerequisite to such jurisdiction must be power over the *res*. *Hanson* v. *Denckla*, *supra*.

Although Citibank might be liable personally for wrongfully refusing to surrender property on which the Govern-
67 ment holds a lien, 28 U.S.C. § 6332, any such action would have to be predicated on the existence of a valid lien. See 28 U.S.C. § 7403. Since the property is without the *United States*, no valid lien ever attached.

The Government, however, asserts that the words of the tax lien statute, 28 U.S.C. § 6321, have a global application and that the lien attaches to property of the taxpayer anywhere in the world. If taken literally, the statute might be susceptible to this interpretation, but to so construe it would do violence to the settled principle of statutory construction that legislation is meant to apply only within the territorial jurisdiction of the United States unless a contrary intention appears. *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932); *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949); *Lauritzen* v. *Larsen*, 345 U.S. 571, 577 (1953); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 371 U.S. 10, 21–22 (1963). The Supreme Court has made manifest its reluctance to read an extraterritorial force into statutes when to do so would extend coverage beyond places over which the United States has legislative control, *Foley Bros., Inc.* v. *Filardo*, *supra*, or would interfere with the rights of other nations, *Lauritzen* v. *Larsen*, *supra*.

It has long been a general rule that one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim. *Government of India* v. *Taylor*, [1955] A.C. 516; *Moore* v. *Mitchell*, 28 F. 2d 997 (S.D.N.Y. 1928), aff'd, 30 F. 2d 600 (2d Cir. 1929), aff'd on other grounds, 281 U.S. 18 (1930); *State of Colorado* v. *Harbeck*, 232 N.Y. 71,

133 N.E. 357 (1921). *Contra, State ex rel. Oklahoma Tax Comm'n* v. *Rodgers*, 238 Mo. App. 1115, 193 S.W. 2d 919 (1946). The nations of the world have only recently begun to deal with the problem of extraterritorial collection
68 of tax revenues through the medium of negotiated tax treaties providing for mutual cooperation.[12] See Note, International Enforcement of Tax Claims, 50 Colum. L. Rev. 490 (1950). Absent an explicit indication to the contrary, there should not be attributed to Congress an intent to give the courts of this nation, in this highly sensitive area of intergovernmental relations, the power to affect rights to property wherever located in the world. The apparent necessity of tax treaties underscores the conclusion that Congress has seen fit to handle this problem in another manner.

III

Although the result here is in large part dictated by a state rule having its genesis in policy considerations having little to do with the collection of the revenue, application of that rule to the facts here comports with sound reason and public policy. Unfortunate as it may be that Omar will be able to escape, at least partially, from a possible tax liability involving substantial sums, in the long run it is unlikely that a different rule here would provide much consolation to the Internal Revenue Service. The artful tax dodger would not have to be too sophisticated to realize that all he need do to escape liability is place his deposits in a bank of local origin that is beyond the power of our courts. This would lead only to harmful consequences for our banking system abroad without any concomitant benefits here at home.

In addition, the rule suggested by the Government would have to work both ways. As yet, our courts have been faced only with cases seeking to attach deposits in foreign branches of American banks by service on the home office here,
69 *Bluebird Undergarment Corp.* v. *Gomez, supra; Clinton Trust Co.* v. *Compania Azucarera Central Mabay S.A., supra; Phillips* v. *Chase National Bank, supra; McCloskey* v. *Chase Manhattan Bank, supra*, and others seeking to attach deposits in foreign banks by service on a branch of such a bank doing business in New York. *Clinton Trust Co.* v. *Compania*

[12] No such treaty exists with Uruguay. 4 CCH Fed. Tax Rep. ¶ 4281.

Azucarera Central Mabay S.A., supra; Phillips v. *Chase National Bank, supra; McCloskey* v. *Chase Manhattan Bank, supra,* and others seeking to attach deposits in foreign banks by service on a branch of such a bank doing business in New York. *Clinton Trust Co.* v. *Compania Azucacera Central Mabay S.A., supra; Welsh* v. *Bustos, supra; Cronan* v. *Schilling, supra; Neton Jackson Co.* v. *Animashun, supra.* However, it is inconceivable that the issuance of an injunction by a court of a foreign country against an American branch bank affecting the accounts or activities of the head office in the United States would be looked upon with favor. The untoward difficulties and potential conflict between the laws of different nations that such a doctrine would produce militate against giving it support here.

The court concludes that the injunction issued by the district court was beyond its jurisdiction as to deposits held abroad that are collectible only outside the United States. The record, however, does not make clear whether any special arrangements may have existed between Citibank and Omar making the deposit payable, not in pesos at Montevideo, but in dollars in New York. The injunction should therefore be modified in such a way as to preserve any rights of the Government should it appear that Omar's accounts were in fact payable in New York.

Vacated in part and remanded for modification of the injunction in conformity with this opinion.

70 HAYS, Circuit Judge, dissenting:

In his learned opinion my brother Moore has almost completely lost sight of what it is that we are asked to review. The extensive dissertation on the nature and characteristics of attachable or lienable property under New York law is an admirable display of my colleague's well known erudition and of his customary careful and exhaustive research. But it has little if anything to do with the case in hand.

The order appealed from was issued by the district court under the authority of § 7402(a) of the Internal Revenue Code of 1954 which provides:

> "The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appoint-

ing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."

The order of the district court does not purport to establish or enforce any lien on any property or to direct the payment of any sums whatever. It is a simple order, confined to a direction to the appellant (and certain others) to keep the property of the taxpayer which they now hold. The order reads:

"ORDERED, that pending the determination of this action or until further order of this Court, the defendants, Lazard Freres & Co., Lehman Brothers,
71 Belgian-American Banking Corp. and First National City Bank of New York, or any of them, be and they are hereby restrained from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of Omar, S.A., including, but not limited to, any sums, credits, stock, or bonds or any interest, dividends, or other earnings thereon now held for or for the account of the said Omar, S.A., by them or by any of their branches, agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not."

The record indicates that the district court was completely justified in issuing the injunction. In May 1962 counsel for taxpayer told government representatives that if the government should attempt to establish tax liability, taxpayer would liquidate its holdings in the United States. Later one of taxpayer's directors came to the United States and began a systematic liquidation of those holdings. By October 31, 1962, when the Commissioner assessed jeopardy assessments totaling $19,300,000, taxpayer had already transferred at least $2,300,000 out of the country.

The order is merely a preliminary injunction to prevent further dissipation of taxpayer's assets. The district court did not determine, nor was there any occasion for its determining, whether the government's lien attached to all the

property immobilized by the order, or what part of such property the government would be able to get possession of in the later stages of this proceeding or in some other proceeding.

There is no doubt that the district court, having in personam jurisdiction over appellant, had the power to issue its order.

Indeed appellant does not deny such power except
72 with respect to property of the taxpayer held by appellant's foreign branches. The district court has the power to order the appellant over whom it has personal jurisdiction to act or to refrain from acting both within and without the territorial jurisdiction of the court. *United States* v. *Ross*, 302 F. 2d 831 (2d Cir. 1962). It is of no consequence, as the majority believes, that the court does not have jurisdiction over Omar. The court's jurisdiction is not in any sense jurisdiction over the res, it is jurisdiction over the person of the appellant.

The present issue as to property of the taxpayer which is held by appellant's foreign branches is not, as the majority believes, whether that property can be recovered in the pending proceeding. The only issue is whether appellant has power to carry out the order of the court with respect to that property. It is clear that appellant has that power (*First National City Bank* v. *Internal Revenue Service*, 271 F. 2d 616 (2d Cir. 1959), *cert. denied* 361 U.S. 948 (1960)), and indeed appellant does not deny that it could prevent its foreign branches from releasing property to the taxpayer.

Appellant cannot at this stage be permitted to argue that, although it does not deny that it could effectively prevent its foreign branches from paying out money to the taxpayer, it cannot be required to do so because the government may not be able to recover that money in the present suit. Neither the district court nor this court can or should decide on the present record that the government has no recourse by which it could ever recover the property which the government seeks to protect from dissipation. Even if it should be granted that in the present proceeding the government could not recover property of the taxpayer held by a foreign branch, is this court now prepared to hold, for example, that there is no possibility

that a receiver appointed under the authority of
73 § 7402(a) would be able to proceed against taxpayer's property under any circumstances or anywhere other than New York? The majority's reference to the absence of a

tax treaty with Uruguay is irrelevant since not only is the absence of such a treaty not dispositive, but there is nothing in the record before us to show that foreign branches of appellant other than that in Montevideo do not hold property of the taxpayer.

The result of the present decision is a wholly unwarranted limitation on the government's power to preserve property of delinquent taxpayers from dissipation pending proceedings to recover that property. With respect I must dissent.

74 In the United States Court of Appeals for the Second Circuit

Present: Hon. LEONARD P. MOORE, Hon. HENRY J. FRIENDLY, Hon. PAUL R. HAYS, Circuit Judges

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

OMAR, S.A., LAZARD FRERES & CO., ET AL., DEFENDANTS

FIRST NATIONAL CITY BANK OF NEW YORK (FIRST NATIONAL CITY BANK), DEFENDANT-APPELLANT

Judgment—June 26, 1963

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is vacated in part and that the action be and it hereby is remanded for a modification of the injunction in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

By VINCENT A. CARLIN,
Chief Deputy Clerk.

75 [File endorsement omitted]
76 [File endorsement omitted]

77 In the United States Court of Appeals
for the Second Circuit

Docket No. 27980

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FIRST NATIONAL CITY BANK, DEFENDANT-APPELLANT

and

OMAR, S. A., A URUGUAYAN CORPORATION; LAZARD FRERES & CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; AND FIRST NATIONAL CITY TRUST CO., DEFENDANTS

Petition for Rehearing by the United States of America and Motion in The Alternative for a Stay of the Mandate—Filed July 10, 1963

To the honorable LEONARD P. MOORE, HENRY J. FRIENDLY, and PAUL R. HAYS, United States Circuit Judges:

HONORABLE SIRS: The United States of America, appellee, respectfully presents this petition, pursuant to Rule 25 of the Rules of this Court, for a rehearing of the decision rendered June 26, 1963, which vacated in part and remanded an injunction issued by the order of the Honorable Archie O. Dawson, United States District Judge for the Southern District of New York, which *inter alia* enjoined the
78 transfer of property or rights to property held by the appellant, First National City Bank of New York ("Bank"), for the account of Omar, S. A. ("Omar"), a delinquent taxpayer.

The District Court grounded the issuance of the preliminary injunction on the fact that corporate income and personal holding company taxes in excess of $19,000,000 had been assessed against Omar. It further found an intent on the part of Omar to liquidate, with transfers of substantial assets abroad. The District Court concluded that there was

"a clear and present danger that plaintiff may be unable to recover upon defendant Omar's tax liability." (6a–7a) [1]

This petition requests rehearing of the decision of Judges Moore and Friendly, Judge Hays dissenting, which held that the preliminary injunction issued by the District Court was beyond its jurisdiction as to deposits held abroad in foreign branches of the Bank which "are collectible only outside the United States."

The grounds for this petition are that:

a. The present decision is based largely on the assumption that personal jurisdiction will not be obtained over Omar and on the further premise that the Bank, a single corporate entity, over which personal jurisdiction has been obtained, may not be enjoined from transferring Omar's property located outside the jurisdiction, without jurisdiction being obtained over Omar. The United States, which in this action seeks *inter alia* a judgment *in personam* against Omar, is taking necessary steps to effectuate personal jurisdiction over Omar. As Judge
79 Hays stated in the dissenting opinion, the injunction here involved is necessary to preserve property of a delinquent taxpayer from dissipation pending proceedings to recover such property.

b. The Court's conclusion is also based on the erroneous premise that a federal tax lien does not extend to property located outside the United States. This premise is in conflict with *United States* v. *Ross*, 302 F. 2d 831 (2d Cir. 1962).

c. The Court's determination that a taxpayer's deposits in foreign branches of a national bank which are payable, in the first instance, at the branches abroad do not consitute property or rights to property in the United States, is erroneous and in conflict with the previous decision of this Court in *First National City Bank* v. *Internal Revenue Service*, 271 F. 2d 616 (2d Cir. 1959), *certiorari denied* 361 U.S. 948, *rehearing denied* 362 U.S. 906; the decisions of the New York Court of Appeals in *Sokoloff* v. *National City Bank*, 239 N.Y. 158 (1924) and 250 N.Y. 69 (1928), and the well-reasoned opinion of Judge Irving Kaufman in *McGrath* v. *Agency of Chartered Bank*, 104 F. Supp. 964 (S.D. N.Y. 1952), *affirmed per curiam*, 201 F. 2d 368 (2d Cir. 1953).

[1] References with the suffix "a" refer to the Bank's appendix heretofore filed in this action.

d. The Court has given undue weight to the alleged "harmful consequences" to our national bank system abroad which might result from a decision recognizing the Government's right to reach bank deposits in a foreign branch of national bank to satisfy an outstanding tax liability. The present decision reveals a singular solicitude for the Bank's possible loss of the business of the "artful tax dodger."

Finally, rehearing is prayed in this case because the issues raised in the present decision have their greatest (if
80 not only) impact in this Circuit by virtue of New York's status as the center of international banking in this country. By the very nature of the present decision, the questions raised here may never again be presented to this Court, since no District Judge in this Circuit would issue an injunction such as the one issued by Judge Dawson. This Court, in the present decision, recognized that this case presented "an important question." Therefore, if the panel of this Court reaffirms its decision, the Government respectfully suggests that the matter be referred to the active Circuit Judges for determination *en banc*. Because of the apparent conflict with other decisions of this Circuit, the importance of the question here and the concentration of the problems involved in this Circuit, an *en banc* determination of this case is justifiable and appropriate.

Argument in Support of Petition for Rehearing

The present decision is based on the Court's assumption that the District Court will never obtain personal jurisdiction over the taxpayer, Omar.[2] At this stage of the proceeding,
81 such conclusion is premature if not altogether erroneous. The Government contended in the brief heretofore filed in this Court that there is every likelihood that personal jurisdiction over Omar can be effectuated by the service of process upon Omar's representatives who performed acts within this jurisdiction. Furthermore, even if this course of action not be possible, Omar may voluntarily appear in this action since the injunction of the District Court has successfully preserved several million dollars of assets belonging to Omar which are now held by the defendant, Lehman Brothers. (See Government Brief, p. 24, footnote 14.)

[2] A federal tax lien may be enforced against the taxpayer's property or rights to property without the necessity of obtaining personal jurisdiction

A. THE DISTRICT COURT HAS THE POWER TO ENJOIN THE BANK FROM DISSIPATING THE TAXPAYER'S ASSETS

As Judge Hays concluded, "there is no doubt" that the District Court, having *in personam* jurisdiction over the Bank, had the power to enjoin the Bank from dissipating the taxpayer's assets. The issue here is whether the Bank had the power to carry out the order of the District Court not to permit dissipation of deposits of the taxpayer in its foreign branches. The principle which controls this very question was decided by this Court in *First National City Bank* v. *Internal Revenue Service*, 271 F. 2d 616 (2d Cir. 1959), *certiorari denied*, 361 U.S. 948 (1960). See also *United States* v. *Ross*, 302 F. 2d
82 831 (2d Cir. 1962).[3] The Bank is a single corporation. Its "branches", foreign and domestic, are just that: branches. They are not separate entities in form or in fact. An order from the corporation's Board of Directors in New York will be or should be honored in a branch in Los Angeles or Montevideo or Paris. The District Court had the clear power to direct the New York corporation not to permit dissipation of assets in its possession and control.

The jurisdictional basis, then, for the injunction issued by the District Court was personal jurisdiction over the Bank. Certainly, at this stage of the proceeding, it is inconsequential whether the District Court has jurisdiction over a *res* or over the taxpayer. The injunction issued by the District Court

---

over the taxpayer. As we will demonstrate below, a tax lien has attached to Omar's deposits in the Bank, which is a single corporate entity having its head office in New York City. Omar's deposits constitute rights to property which were within the jurisdiction of the District Court. See *Sokoloff* v. *National City Bank*, 239 N.Y. 138 (1924); *First National City Bank* v. *Internal Revenue Service*, 271 F. 2d 616 (2nd Cir. 1959), *certiorari denied* 361 U.S. 948 (1960). It is only in the event that the Court concludes that the lien does not attach to such deposits that personal jurisdiction over Omar becomes relevant. In such event the Government should be afforded an opportunity to obtain personal jurisdiction over Omar and the injunction should stand pending such efforts.

[3] In *United States* v. *Ross*, *supra*, at p. 834, one of the orders sustained by this Court was an injunction of the District Court ordering Ross, as the major stockholder and president of two corporations, to refrain from dealing with or transferring property of two corporations. The Court had not obtained jurisdiction over either corporation. The injunction was upheld on the ground that the Court had jurisdiction over Ross and could restrain him from acting "to frustrate the Court's powers by transferring corporate property."

which directed the Bank to hold the property of the taxpayer pending the outcome of the litigation was proper under the broad congressional grant of authority to the district courts embodied in Section 7402(a) of the Internal Revenue Code of 1954 (the "Code").[4] The injunction of the District Court did not purport to establish or enforce any lien on any property or to direct the Bank to pay any sums to the United States or into Court.

83 B. A FEDERAL TAX LIEN ATTACHES TO PROPERTY OUTSIDE THE UNITED STATES

However, even if the issues at bar are properly to be decided on the basis of whether a lien created under Section 6321 of the Code attaches to bank deposits of Omar in foreign branches of the Bank which are payable outside the United States, the Court was incorrect in concluding that the tax liens against Omar did not attach to such bank deposits. The Court's conclusion is based, first, on the proposition that a federal tax lien does not attach to property or rights to property outside the United States and, second, on the proposition (discussed in Part C, *infra*) that such bank deposits in foreign branches constitute rights to property outside the United States. We submit that the Court erred as to both of these very important propositions.

The determination that a federal tax lien does not attach to property or rights to property outside the United States conflicts with the decision of this Court in *United States* v. *Ross*, *supra*. In *Ross*, this Court held that the District Court had not exceeded its jurisdiction (a) in appointing a receiver under Section 7403(d) of the Code to enforce a tax lien over taxpayer's property, situate both within and without the United

[4] Section 7402(a) of the Code provides:

"The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."

The remaining relevant statutory provisions are set forth at footnote 4 of the opinion.

States, and (b) in directing the taxpayer to transfer to the receiver stock certificates of foreign corporations and other property having a situs outside the United States. It is true that in *Ross*, personal jurisdiction had been obtained over the taxpayer, but that is not a basis for distinction here since the remedy of the appointment of a receiver under Section 7403(d) is based on the existence of a lien on property to be enforced by such receiver, and not on the basis of personal jurisdiction over the taxpayer. The lien to be enforced and the remedies and procedures approved by this Court in *Ross* were, perforce, based upon the recognition that the lien attached to property located outside the United States.

84

This principle, of necessity, emanates from the fundamental nature of our Federal Internal Revenue Code. It is global in scope and levies a tax on income of United States citizens and residents from all sources, both foreign and domestic. See Section 61 of the Code. The provisions of the Internal Revenue Code relating to the enforcement of tax liens and Section 7402(a) authorizing injunctions in aid of revenue enforcement are part of and partake of the fundamental philosophy of our tax laws with respect to foreign corporations and foreign source income: United States corporations and residents are responsible under our tax laws for tax on their income from all sources, foreign corporations are subject to tax and therefore to United States jurisdiction on all fixed and determinable income from United States sources and on all income from United States business. The procedures for collecting tax by withholding from wages have similar global application. Certainly the Bank, as any domestic corporation, is required to withhold tax on wages earned by United States citizens employed in its foreign branches. See Sections 3401 and 3403 of the Code.

This is a Federal income tax case. The cases relied upon by the Court in concluding that a Federal tax lien does not extend to property located outside of the United States are not applicable here since they do not treat with the levy and collection of a Federal income tax. Since income, whether derived here or abroad, is subject to income tax, the remedies for the collection of tax on such income must of necessity pertain whether such remedies are sought to be applied with respect to property located here or abroad.[5]

85

[5] The question of whether a foreign state will or will not permit a tax remedy to be enforced against property within such foreign state is irrel-

C. THE BANK DEPOSITS ARE WITHIN THE JURISDICTION OF THE DISTRICT COURT

However, even if we are to assume that the jurisdiction of the District Court depends upon a conclusion that the Bank has property or rights to property within the district, it is clear that under well-established principles, the Bank deposits and Omar's right to them are property within the Southern District. The Court's decision is based on the assumption that bank deposits in foreign branches of a national bank, which deposits are payable, in the first instance, at such foreign branches, are not property within the United States. The present decision fixes the situs of the debt arising from such deposits at the place of payment and this is a departure from the principle accepted by this Circuit that "the place of payment is not the criterion of a debt's situs." *McGrath* v. *Agency of Chartered Bank*, 104 F. Supp. 964 (S.D. N.Y. 1952), *aff'd per curiam*, 201 F. 2d 368 (2d Cir. 1953).[6]

86

See also, *Chicago, Rock Island and Pacific Railway Co.* v. *Sturm*, 174 U.S. 710 (1899); *Blackstone* v. *Miller*, 188 U.S. 189, 205–206 (1903). What does control in determining whether a court has jurisdiction over a debt is whether the court has power over the person of the debtor. *McGrath* v. *Agency of Chartered Bank, supra*; *Blackstone* v. *Miller, supra*.

Since the main office of the Bank was located within the Southern District of New York, the District Court clearly had power over the person of the Bank. Four years ago, this Court, relying on section 25 of the Federal Reserve Act of 1913, 38 Stat. 271, 12 U.S.C. 601–604 held that a subpoena served upon the main office of a national bank could compel the pro-

evant here. See *United States* v. *Ross, supra*, 302 F. 2d at 834. The *Ross* case expressly holds that our courts may promulgate decrees against persons within the court's jurisdiction which decrees affect property and rights to property in a foreign state. However, our courts may not issue decrees which would require a person to act in violation of the laws of the foreign state. See, *In re Chase Manhattan Bank*, 297 F. 2d 611 (2d Cir. 1962); *United States* v. *Ross, supra*, 302 F. 2d at 834. It is this latter principle which prevents the infringement of the rights of foreign states in this area of intergovernmental relations. There is no suggestion here that the injunction violates the law of any foreign state.

[6] In *McGrath* v. *Agency of Chartered Bank*, Judge Kaufman held that a debt payable only in Hamburg, Germany to persons residing in that city was property within the United States since the debtor resided in the United States.

duction of records held at a foreign branch. *First National City Bank* v. *Internal Revenue Service*, 271 F. 2d 616 (2d Cir. 1959). The Court's opinion was based on the proposition that the main office of a national bank, as well as all its branches, were part of one corporation, and the managers of all branches were subject to the control of the Board of Directors of the national bank[7] (271 F. 2d at 619).

It is also clear that the single entity of the national bank is ultimately responsible to make good the deposits in (and other debts of) its branches, both foreign and domestic. *Sokoloff* v. *National City Bank*, 239 N.Y. 138 (1924) and 250 N.Y. 69 (1928). In the *Sokoloff* cases, the New York Court of Appeals held that a depositor could bring an action in New York City (where the head office of the national bank was located) against a national bank where payment had been refused—or could not be made—at the foreign branch of the bank where the deposits were payable. The Court of Appeals concluded that the national bank, as a whole, became liable to the depositor at the time the deposits were made.

87

The two principles which clearly emerge then from *First National City Bank* v. *Internal Revenue Service*, *supra*, and *Sokoloff* v. *National City Bank*, *supra*, are (a) a district court sitting where the main office of a national bank is located has the power to compel the bank and any of its branches, foreign or domestic, to act or refrain from acting, and (b) the single entity of a national bank is responsible and liable for deposits made in the bank, whether such deposits are held at the main office or any of its branches. These two fundamental principles were entirely disregarded by the Court in the present decision.

The rules which were formulated in *First National City Bank* v. *Internal Revenue Service*, *supra*, and *Sokoloff* v. *National City Bank* are based on the grounds that (a) the main office and the branches of a national bank are part of a single corporate entity (not parent and subsidiary),[8] and (b) the

[7] It is, of course, the control over the *Board of Directors* at the head office of a national bank which gives a court sitting in the district in which the head office is located the power, under the *First National City Bank* v. *Internal Revenue Service* decision, to affect the activities of a foreign branch. A national bank is, of course, a creature of federal law. The existence of the bank and the conditions of its operations are determined under such law.

[8] All national banks, including the appellant, are required to operate abroad by means of branches rather than foreign subsidiary corporations.

national bank maintains *one* capital account for its main office and branches, and while accounts of each foreign branch must be maintained separately from the main office and domestic branches, the national bank *must* at the end of each fiscal period transfer to its general ledger the profit or loss accrued at the branch for such period.[8]

For certain purposes, branches of a national bank are sometimes treated as separate entities. This treatment of branches as separate entities is generally applicable in cases involving negotiable instruments. See, for example, *Chrzanowska* v. *Corn Exchange Bank*, 173 App. Div. 285, 159 N.Y.S. 385, *aff'd* 225 N.Y. 728 (1919), *Pan-American Bank & Trust Co.* v. *National City Bank*, 6 F. 2d 762 (2d Cir.) *cert. den.* 269 U.S. 554. However, the special treatment of branches of national banks as separate entities for cerain purposes should not obscure the fact that branches of a national

12 U.S.C. 601. As a single corporate entity, the bank is subject to federal income tax on the net income earned by the corporate entity as a whole—the main office and foreign and domestic branches. For an excellent discussion of some of the differences in tax consequences between operating abroad through branches of a single corporate entity and operating abroad through subsidiaries of a domestic parent corporation, see the opinion of this Court in *Associated Telephone and Telegraph Co.* v. *United States*, 306 F. 2d 824, 832-3 (2d Cir. 1962), *cert. den.*, 83 S.Ct. 504.

[8] Section 25 of the Federal Reserve Act, 12 U.S.C. §§ 601-604, expressly provides that a national bank must keep the accounts of each foreign branch separate from its head office and other branches. The national bank must, at the end of each fiscal period, transfer to the general ledger of the entire bank the profit or loss accrued at each branch. The singularity of entity of a national bank from a fiscal standpoint is also illustrated by certain representations made by the appellant Bank in connection with a ruling request submitted by the Bank to the Commissioner of Internal Revenue relating to the treatment of currency devaluation "losses." A copy of the Bank's ruling request was annexed to the memorandum of law submitted below to Judge Dawson. Significant statements contained therein include the following:

"As of December 31, 1954, the statement of condition of the bank showed capital of $200,000,000—Surplus of $300,000,000—and Undivided Profits of $52,662,613. These funds represent the equity of stockholders and are held for the protection of all depositors, both domestic and foreign." (Page 1)

". . . each branch remits all its net income to the head office monthly, unless it is prohibited by law from so doing." (Page 2)

"A bank or any other corporation, of course, has only one actual capital account, representing the capital paid in by shareholders, and a foreign branch of a bank cannot have a capital separate from that of the bank itself." (Page 2)

bank are part of a single corporate entity. In the present decision, the Court heavily relies on certain New York cases, which appear to hold that a creditor of a depositor may not attach at the main office a deposit payable at a branch of the bank, for its conclusion that the deposits here which are payable, in the first instance, abroad are not property within the jurisdiction of the District Court.[10] However, the New York cases which apparently prevent attachment of branch deposits at the main branch are based on the theory that attachment may not be utilized as a remedy other than at the place where the debt is then payable and do not stand for the proposition that there are no property rights at the main office. *McGrath* v. *Agency of Chartered Bank, supra, First National City Bank* v. *Internal Revenue Service, supra, and Sokoloff* v. *National City Bank, supra,* clearly establish that bank deposits in national banks, wherever such deposits are payable, are property within the jurisdiction of a district court sitting where the head office of the bank is located. The contract right of Omar which may be enforced at the head office in New York, subject to a condition precedent, constitutes a property right of Omar within the District Court's jurisdiction.

On the basis of the New York attachment cases, a question which may arise at the conclusion of this litigation is whether the United States will be required to demand payment of the deposits at the branch where such deposits are payable before a demand may be made at the head office. *United States* v. *Bowery Savings Bank*, 297 F. 2d 380 (2d Cir. 1961) is authority for the position that the condition precedent of a demand at the foreign branch is not a prerequisite for recovery of the deposits by the United States. See also *United States* v. *Bess*, 357 U.S. 51 (1958); Cf. *McGrath* v. *Cities Service Co.*, 189 F. 2d 744 (2d Cir. 1951), *aff'd*, 342 U.S. 330 (1952). However, if demand at the foreign branches is required before payment can be required of the main office.

90

[10] Several of the New York cases relied upon in the present decision turn on an interpretation of 12 U.S.C. 604 which is in conflict with the interpretation of such section by this Court in *First National City Bank* v. *I.R.S., supra.* See, e.g., *Bluebird Undergarment Corp.* v. *Gomez*, 139 Misc. 742, 249 N.Y.S. 319 (City Ct., N.Y. Cty. 1931) (slip opin. 2654-5); *Clinton Trust Co.* v. *Compania Azucarera Central Mabay S.A.*, 172 Misc. 148, 14 N.Y.S. 743 (Sup. Ct. N.Y. Cty.) *aff'd* 258 App. Div. 780 (1st Dept. 1939) (slip opin. 2655, 2659); *Cronan* v. *Schilling*, 100 N.Y.S. 2d 474, 476 (Sup. Ct., N.Y. Cty. 1950) (slip opin. 2656).

the Government can and would take all steps necessary to demand and receive payment at the foreign branches. The denial here of relief to the United States on the ground presumably that a demand for payment of the deposits may in the future be required to be made at the foreign branch is most premature. At this stage the Government does not even know at which foreign branches demands are to be made, assuming such demands are deemed essential. See dissenting opinion of Judge Hays. (slip opin. 2667).

D. THE POLICY CONSIDERATIONS RELIED ON IN THE PRESENT DECISION

The result reached in the present decision was "in large part dictated" by "policy considerations having little to do with the collection of the revenue". In fact, the Court recognizes that by reason of its holding "Omar will be able to escape, at least partially, from a possible tax liability involving substantial sums". However, the result reached is justified by the Court on the ground that if the "artful tax dodger" does not
91 make his deposits at foreign branches of our national banks, this "would lead only to harmful consequences for our banking system abroad without any concomitant benefits here at home." (slip opin. 2662).

This reasoning of the Court, with its excessive concern for the "artful tax dodger", is highly questionable. It is undeniable that if we made certain of our institutions havens for tax dodgers and other unlawful elements, the business of these national institutions located here and abroad might, to some extent, increase. But the essence of our system of government is that our national institutions should not be utilized as havens for tax dodgers or as places of immunity for taxpayers who wish to evade their responsibilities to our Government. Presumably, national banks licensed by the United States have other advantages which would attract depositors and maintain United States institutions in an advantageous position over banks of local origin.

Finally, we submit that policy considerations concerning our banking system abroad primarily repose with the executive and legislative branches of our Government. If the executive branch has erred here in its policy determination, and if harm does result to our banking system abroad which outweighs the revenue considerations involved, Congress, acting on its own

initiative or at the request of the Executive, can amend the law after a comprehensive study of the problems involved.[11]

92 E. CONCLUSION

We submit that Judge Hays was correct in stating that the present decision "is a wholly unwarranted limitation on the Government's power to preserve property of delinquent taxpayers from dissipation pending proceedings to recover that property." The present decision is also in conflict on essential points with prior decisions of this Court in *McGrath* v. *Agency of Chartered Bank, supra; First National City Bank* v. *I.R.S., supra;* and *United States* v. *Ross, supra.*[12] Because New York City is the center in this country for international banking, the issues raised here are largely indigenous to this Circuit and it is here that the impact of the present decision will be the greatest.

If rehearing is granted, we would respectfully request the opportunity to submit a brief setting forth in detail the Government's position with respect to the issues raised in the present decision.

MOTION, IN THE ALTERNATIVE, FOR A STAY OF MANDATE

If the Court does not grant rehearing or if rehearing is granted and the present decision remains standing, we respectfully move this Court, under Title 28, U.S.C. 2101(f) and Rule 28(c) of the Rules of this Court, for an order
93 staying the mandate herein, pending the filing by the Government (if so authorized by the Solicitor General of the United States) of an application for a writ of certiorari

---

[11] Congress has had occasion in recent years to consider legislation dealing with various complex questions concerning the taxation of American investments abroad; the utilization of foreign tax havens by American businesses; and the competitive position of foreign branches of national banks in relation to banks of local origin. See Revenue Act of 1962, § 12(a), 76 Stat. 1052; 26 U.S.C. 951, et seq., and 76 Stat. 388, 12 U.S.C. 604a.

[12] It is of some interest to note that the three prior decisions of this Court in conflict with the present decision were concurred in by three of the now active judges of the present Court, namely, Chief Judge Lumbard (*First National City Bank* v. *I.R.S.*); Judge Smith (*First National City Bank* v. *I.R.S.* and *United States* v. *Ross*) and Judge Hays (*United States* v. *Ross*). In addition, Judge Kaufman, then a District Judge, wrote the opinion in the *Agency of Chartered Bank* case which was affirmed *per curiam* by this Court.

to the United States Supreme Court and the final disposition therein of the case.

Respectfully submitted,

ROBERT M. MORGENTHAU,
United States Attorney for the Southern District of New York, Attorney for United States,

and

ROBERT ARUM,
Assistant United States Attorney.

LOUIS F. OBERDORFER,
Assistant Attorney General.

HAROLD C. WILKENFELD,
Attorney, Department of Justice,
Washington 25, D.C.
Of Counsel

94 CERTIFICATE OF COUNSEL

I, ROBERT ARUM, Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, counsel for the United States of America, do hereby certify that the foregoing petition for rehearing and motion, in the alternative, for a stay of mandate are presented in good faith and not for the purpose of delay.

Robert Arum
ROBERT ARUM

Dated: New York, New York, July 9, 1963

95 In the United States Court of Appeals
for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of September, one thousand nine hundred and sixty-three.

Present: Hon. J. EDWARD LUMBARD, Chief Judge, Hon. CHARLES E. CLARK, Hon. STERRY R. WATERMAN, Hon. LEONARD P. MOORE, Hon. HENRY J. FRIENDLY, Hon. J. JOSEPH SMITH, Hon. PAUL R. HAYS, Hon. THURGOOD MARSHALL, Circuit Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

OMAR, S.A., LAZARD FRERES & CO., ET AL. DEFENDANTS

FIRST NATIONAL CITY BANK OF NEW YORK, (FIRST NATIONAL CITY BANK), DEFENDANT-APPELLANT

Order granting rehearing in banc—September 19, 1963

A petition for a rehearing in banc having been filed herein by counsel for the appellee.

Upon consideration thereof, it is

Ordered that said petition for rehearing in banc be and hereby is granted and that the Court will sit in banc to hear argument on Friday, October 18, 1963, at 10:30 A.M.

Further ordered that the parties shall exchange and file briefs on or before October 11, 1963.

A. DANIEL FUSARO,
Clerk.

96 [File Endorsement Omitted]

97 In the United States Court of Appeals
for the Second Circuit

No. 196—September Term, 1963

Argued October 18, 1963

Docket No. 27980

UNITED STATES OF AMERICA, APPELLEE

v.

FIRST NATIONAL CITY BANK, APPELLANT

and

OMAR, S. A., A URUGUAYAN CORPORATION; LAZARD FRERES & CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; AND FIRST NATIONAL CITY TRUST CO., DEFENDANTS

Before LUMBARD, Chief Judge, CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, HAYS and MARSHALL, Circuit Judges

98 *Louis F. Oberdorfer*, Assistant Attorney General, Department of Justice, Washington, D.C. (Harold C. Wilkenfeld, Michael A. Mulroney and Timothy B. Dyk, Attorneys, Department of Justice, Robert M. Morgenthau, United States Attorney for the Southern District of New York, Robert Arum and Stephen Charnas, Assistant United States Attorneys, on the brief), for appellee.

Henry Harfield, New York, N.Y. (Shearman & Sterling, Herman E. Compter and John E. Hoffman, Jr., New York, N.Y., on the brief), for appellant.

Milbank, Tweed, Hadley & McCloy, New York City (Roy C. Haberkern, Jr., and Isaac Shapiro, of counsel), for The Chase Manhattan Bank; Breed, Abbott & Morgan, New York City (Edward J. Ross, of counsel), for The First National Bank of Boston; Meyer, Kissel, Matz & Seward, New York City (Lester Kissel, of counsel), for Bank of America National Trust and Savings Association, as *amici curiae*.

Opinion—Decided January 13, 1964

PER CURIAM:

The court having sat *in banc* to hear the appeal, with the exception of Judge Kaufman who did not participate, and due deliberation having been had thereon, Judges Lumbard, Waterman, Moore, and Friendly vote to reverse the order of the district court for the reasons set forth in Judge Moore's opinion reported at 321 F. 2d 14, and Judges Smith, Hays, and
99 Marshall vote to affirm for the reasons set forth in Judge Hays' opinion reported at 321 F. 2d 25.[1] The order of the district court, reported at 210 F. Supp. 773 (1962), is accordingly reversed.

Upon application therefor, the court will grant a stay, pursuant to Rule 28(c), pending application for certiorari to the Supreme Court of the United States.

100 In the United States Court of Appeals
for the
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of January one thousand nine hundred and sixty-four.

Present: Hon. J. EDWARD LUMBARD, Chief Judge,
Hon. STERRY R. WATERMAN,
Hon. LEONARD P. MOORE,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Hon. PAUL R. HAYS,
Hon. THURGOOD MARSHALL, Circuit Judges

[1] Prior to his death Judge Clark had indicated his intention to vote for affirmance.

No. 196

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

OMAR, S.A., LAZARD FRERES & CO., ET AL., DEFENDANTS
FIRST NATIONAL CITY BANK OF NEW YORK
(FIRST NATIONAL CITY BANK), DEFENDANT-APPELLANT

Judgment—January 13, 1964

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

Further ordered that the judgment of this Court of June 26, 1963 be and it hereby is vacated.

A. DANIEL FUSARO,
Clerk.

101 [File endorsement omitted]

102 [Clerk's certificate to foregoing transcript omitted in printing.]

103 Supreme Court of the United States

October Term, 1963

No. 998

UNITED STATES, PETITIONER

vs.

FIRST NATIONAL CITY BANK

Order allowing certiorari—Filed June 1, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1964